Applicant Details

First Name	**Samuel**
Middle Initial	**B.**
Last Name	**Armstrong**
Citizenship Status	**U. S. Citizen**
Email Address	**ygm5ct@virginia.edu**
Address	**Address** Street **40 Wilton Pasture Lane, 201** City **Charlottesville** State/Territory **Virginia** Zip **22911** Country **United States**
Contact Phone Number	**540-416-8869**

Applicant Education

BA/BS From	**Southern Virginia University**
Date of BA/BS	**May 2020**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Sports and Entertainment Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William Minor Lile Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Enright, Deirdre
deirdre@law.virginia.edu
(434) 243-4942

Frampton, Thomas
tframpton@law.virginia.edu
(434) 924-4663

Barzun, Charles
cbarzun@law.virginia.edu
(434) 924-6454

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Samuel B. Armstrong

40 Wilton Pasture Lane, Apt. 201, Charlottesville, VA 22911 • (540) 416-8869 • ygm5ct@virginia.edu

June 12, 2023

The Honorable Leslie Abrams Gardner
U.S. District Court, M.D. Ga.
201 West Broad Avenue
Albany, GA 31701

Dear Judge Gardner:

I am a rising third-year student at the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers following my graduation in May 2024.

I have enclosed my resume, law school transcript and undergraduate transcript with this application. I have also enclosed an excerpt from a brief I wrote for the Lile Moot Court Competition as a writing sample. Finally, included are letters of recommendation from Professor Deirdre Enright (434-243-4942), Professor Thomas Frampton (434-924-4663), and Professor Charles Barzun (434-924-6454).

Please feel free to reach out to be at the above address, telephone number or email address. Thank you for considering me.

Sincerely,

Samuel Armstrong

Samuel B. Armstrong

40 Wilton Pasture Lane, Apt. 201, Charlottesville, VA 22911 • (540) 416-8869 • ygm5ct@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2024

- William Minor Lile Moot Court Competition, Quarterfinalist
- *Virginia Sports and Entertainment Law Journal*, Articles Development Editor
- Rex E. Lee Law Society, President
- Virginia Innocence Project Pro Bono Clinic, Volunteer
- Winter Break Pro Bono: Atlanta Legal Aid Society

Southern Virginia University, Buena Vista, VA
B.A., Psychology, *magna cum laude*, May 2020

- Student Body Vice President of Student Services
- Capital Athletic Conference, Men's Basketball Scholar-Athlete of the Year

EXPERIENCE

Flora Pettit, Charlottesville, VA
Summer Associate, Summer 2023

Professor Deirdre Enright, University of Virginia School of Law, Charlottesville, VA
Research Assistant, Summer 2022

- Researched and wrote memoranda on topics related to unsolved crimes
- Audited files of cases suspected of being influenced by improper police tactics

Southern Virginia University, Buena Vista, VA
Sports Information Director, September 2020 – August 2021

- Recorded statistics and wrote press releases for over 150 athletic events
- Managed a team of eight student workers

Wright Thompson, ESPN, Remote Work
Research Assistant, February 2019 – August 2021

- Performed research and transcription for several high-profile stories and podcasts

Baldridge & Associates, Buena Vista, VA
Intern, May 2019 – October 2020

- Assisted with real estate transactions and file organization

Clear Home, Grand Rapids, MI and Buena Vista, VA
Sales Representative, Summer 2017 & Summer 2018

- Sold over 150 DirecTV accounts door-to-door

The Church of Jesus Christ of Latter-day Saints, Ogden, UT
Full-time Missionary, July 2014 – July 2016

- Contacted and served hundreds of people from diverse backgrounds

INTERESTS

Running, camping, live music, and NBA basketball

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Samuel Armstrong

Date: June 06, 2023
Record ID: ygm5ct

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	B+	Woolhandler,Nettie A
LAW	6002	Contracts	4	B+	Johnston,Jason S
LAW	6003	Criminal Law	3	A	Frampton,Thomas Ward
LAW	6004	Legal Research and Writing I	1	S	Ware,Sarah Stewart
LAW	6007	Torts	4	B+	White,George E
		SPRING 2022			
LAW	6001	Constitutional Law	4	B+	Solum,Lawrence
LAW	7009	Criminal Procedure Survey	4	B+	Harmon,Rachel A
LAW	6113	Intro to Law and Business	2	B+	Geis,George Samuel
LAW	6005	Lgl Research & Writing II (YR)	2	S	Ware,Sarah Stewart
LAW	6006	Property	4	B+	Johnson,Alex M
		FALL 2022			
LAW	7017	Con Law II: Religious Liberty	3	B	Schwartzman,Micah Jacob
LAW	6104	Evidence	4	A-	Barzun,Charles Lowell
LAW	9327	Law & Social Science Colloqium	1	B+	Mitchell,Paul Gregory
LAW	7085	Social Science in Law	3	A-	Monahan,John T
LAW	7087	Sports Law	3	A-	Hartley,Sarah Levine
		SPRING 2023			
LAW	7692	Persuasion (SC)	1	A-	Shadel,Molly Bishop
		SPRING 2023			
LAW	6102	Administrative Law	3	A-	Woolhandler,Nettie A
LAW	8003	Civil Rights Litigation	3	B+	Frampton,Thomas Ward
LAW	7023	Emply Law: Contrcts/Torts/Stat	3	A-	Verkerke,J H
LAW	8667	Fed Crim Sent Reduc Clinic	3	P	Maguire,Mary E.
LAW	9501	Race and Law Short Course (SC)	1	B+	Allen,Terry L.

June 09, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing to recommend Samuel Armstrong for a clerkship with your office. Sam was my Research Assistant for the summer of 2022 and he worked on a pro bono project with a team of law students over winter break. Thus, unlike many professors, I have spent a considerable amount of time with Sam and have gotten to know him well. Sam is both smart and thoughtful, loyal and reliable.

Like so many other law students, Sam's legal education was negatively impacted by the pandemic, and for a considerable span of time, controlled by uncertainty. UVA School of Law has a B+ mean, so Sam's 1L grades were solid, but once there was more normalcy in classroom teaching and student activity, Sam began to really excel. Sam also clearly found his footing during his participation in the William Lyle Moot Court Competition where he and his partner were quarterfinalists. Sam loved the research and writing of the briefs as much as he enjoyed the preparation for and participation in oral argument.

As my Research Assistant, Sam was involved in several different projects I was working on. For one, we were documenting and analyzing massive amounts of evidence at a Commonwealth's Attorney's office in Virginia. Sam had to photograph, upload, describe and tag discovery. He was also required to create and maintain a timeline for a deceased serial killer, in an effort to link the serial killer to unsolved crimes both in and outside the United States. At a different Commonwealth's Attorney's office, I have been asked to review all the cases of a former detective who was convicted of federal crimes and served over ten years. Sam had to review many files, looking for red flags that this detective had engaged in misconduct. The signs were often subtle and required thinking "outside the box" – and Sam caught many, asking excellent questions along the way.

For both projects, we had to travel considerable distances, so in addition to working together, we also socialized. Sam was an excellent team player with his peers, offering to lead when that was needed, and equally content to follow the lead of other more experienced law students. During his two years of work as missionary for his church, Sam became quite adept at being repeatedly required to work with complete strangers, so his comfort level in a variety of social settings is noteworthy. Sam was a solid, diligent, reliable research assistant and a pleasure to work with, both for me and for his peers.

Please do not hesitate to contact me with any other questions.

Sincerely,

Deirdre M. Enright
Professor of Law
Director, Center for Criminal Justice
Director, Project for Informed Reform

Deirdre Enright - deirdre@law.virginia.edu - (434) 243-4942

June 07, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am very pleased to write on behalf of Sam Armstrong, who is applying to serve as your law clerk upon graduation. I know Sam very well—I've taught him twice now, both times in relatively small classes—and I enthusiastically agreed to serve as a recommender when he broached the topic. Apart from doing very well in my classes, he has proven himself to be an exceedingly mature, thoughtful, earnest, and kind person, and I think he would make an excellent law clerk.

On the academic front, Sam has been a pleasure to have in class. While my familiarity with his writing is limited to time-limited exams, what I've seen has been excellent. His exam in my Criminal Law class as a 1L was perhaps the very best in the class (of around 40 students), and throughout the year, he never fumbled a cold-call. He received a grade of "A." He did not perform as well on his final exam in my Civil Rights Litigation class this term (earning "only" a grade of "B+"). But his in-class participation was of a similar caliber. He volunteered when there is a lull in the conversation, but he would never dominate the room. Sam is generally confident in his views, but he seems to approach every topic or issue with a degree of humility: when he says that he tries to see "both sides" to a particular issue, it comes from a very sincere place.

On a personal level, it is difficult to say enough positive things about Sam. While curious and excited about the course material, Sam carries himself with the maturity of a much older law student, and I think his classmates have gravitated toward him as a result. (I have a tough time articulating what it means to have natural "leadership" qualities, but whatever that is, Sam's got it. I have no doubt about his ability to work collaboratively with other co-clerks.) He is disciplined about time-management, a skill he attributes to becoming a father at a relatively young age, and somehow never seems rushed or ill-prepared. He loves sports and is a talented athlete, but would never be mistaken for a "jock": he has a self-deprecating and conscientious manner that is almost impossible to dislike.

In short, I know Sam would make a fantastic law clerk and recommend him highly. If there is any additional information I can provide, please do not hesitate to write (tframpton@law.virginia.edu) or call (202.352.8341).

Sincerely,

Thomas Frampton
Associate Professor of Law
University of Virginia School of Law

June 07, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I write to recommend highly Samuel Armstrong for a clerkship in your chambers. Sam is a smart and focused young man, who I think would make a very strong clerk in your chambers.

I got to know Sam the fall of his second year when he enrolled in my Evidence class. I teach Evidence in a fairly traditional way, using a combination of Socratic method, lecture, and voluntary class discussion. Sam's class had only 46 students in it, which was much smaller than my typical Evidence class because it was in the fall and so had no first-year students. That fact meant that I got to know the students better than I normally do. Sam did not speak up as much as some of the other students in the class, but whenever I called on him, he seemed to know just what my questions were getting at. So I was not surprised that he did well on the final exam, earning an A- for the course.

Sam's performance in my class has been typical of his law-school performance overall. After three semesters, he has a GPA of 3.42, which places him in about the middle of his class. He also has thrown himself into the intellectual and extracurricular life of the law school. He competed as a Quarterfinalist in the Lile Moot Court Competition (more on that below); he serves on the editorial board of the Virginia Sports and Entertainment Law Journal; he has volunteered at the Virginia Innocence Project; and finally, he is the President of the Rex E. Lee Law Society.

Sam's record speaks for itself, but let me just add one more personal note about him. I served as one of the three judges for the Quarterfinals of the moot-court competition in which Sam and his partner failed to advance. As we told the students at the time, it was a very hard decision because both Sam and his partner wrote a very strong brief and argued it well. What particularly impressed me, though, was that a few days later, Sam reached out to me to get more feedback on his brief and to learn more about what he could have done better. In our discussion, it was clear that Sam was really taking in the comments I offered. It struck me that Sam seemed to be the kind of person who is laser-focused on improving his legal skills.

I'm not sure what explains Sam's focus and desire to improve. Perhaps it's because he was a star college basketball player who'd been advised by the school's coach not to even tryout for the team. Perhaps it's because he is more mature than the typical law student. He completed a two-year mission in Utah before attending college and is now married with one child and another on the way. Or perhaps it is due to his growing up in a small, rural, working-class down, where hard work was an expectation and a necessity. Whatever the reason, Sam has become a thoughtful, solid young man, who knows what he's about, what his goals are, and is determined to put in the effort necessary to achieve them.

In Sam's case, those goals entail becoming an expert litigator in private practice or public service. I have every reason to think he will do just that. For underneath his quiet and unassuming manner, is an able mind and a fierce will to improve and excel. For the same reasons, I think he will make a great judicial clerk. Still, if you have any questions about Sam, or would like to discuss his candidacy any further, please do not hesitate to email me (cbarzun@virginia.edu) or call me at any time (434-924-6454), and I will call you back at your convenience.

Sincerely,

Charles L. Barzun

Samuel B. Armstrong

40 Wilton Pasture Lane, Apt. 201, Charlottesville, VA 22911 • (540) 416-8869 • ygm5ct@virginia.edu

The attached writing sample is excerpted from an appellate brief that I wrote for the quarterfinal round of the William Minor Lile Moot Court Competition. In this excerpt, I argue that parents do not have a constitutional right to opt their children out of school curriculum regarding gender identity and transgender issues. For length and clarity, I have included only the first three parts of the argument. I have omitted the standard of review, statement of the case, summary of argument, and the fourth part of the argument. The full brief is available upon request. This writing sample is my own work and has not been edited by any other person.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT CONTAIN A FUNDAMENTAL RIGHT ALLOWING PARENTS TO OPT THEIR CHILDREN OUT OF MANDATORY SCHOOL CURRICULUM.

The District Court was correct in finding that no fundamental right exists for parents to opt their children out of mandatory school curriculum and in granting Mr. Rooney's motion to dismiss. The asserted right fails the history and tradition test found in *Washington v. Glucksberg*, 521 U.S. 702 (1997), does not fall within the *Meyer-Pierce* doctrine, and is contrary to important state interests. In ruling for the appellee, this court will remain consistent with the Supreme Court's practice of being "'reluctant' to recognize rights that are not mentioned in the Constitution." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2247 (2022) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

A. **A parental opt-out right does not pass the Glucksberg test.**

When confronted with a challenge to find a Fourteenth Amendment substantive due process right, the Supreme Court has turned to the *Glucksberg* test, which requires that the asserted right "must be 'deeply rooted in this Nation's history and tradition' *and* 'implicit in the concept of ordered liberty.'" *Dobbs*, 142 S. Ct. at 2242 (quoting *Glucksberg*, 521 U.S. at 721) (emphasis added).

This is a difficult test to meet for at least three reasons. First, both prongs of the test must be satisfied. A substantive due process right cannot either be deeply rooted in this Nation's history and tradition *or* implicit in the concept of ordered liberty, it must be both. Second, each prong is difficult to meet. To meet the "history and tradition" prong, the asserted right must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The words "rooted" and "fundamental" indicate that

much more than an anecdotal or inconsistent connection is needed. The "ordered liberty" prong requires one to prove that without the asserted right "a fair and enlightened system of justice would be impossible," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and that "neither liberty nor justice would exist if [it] was sacrificed." *Id.* at 326. Finally, the *Glucksberg* bar is so difficult to meet because a court must begin with a presumption against finding the asserted unenumerated right. The Court has urged judicial moderation in this area because "[s]ubstantive due process has at times been a treacherous field for this Court . . . [and] that history counsels caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977); *see also Dobbs*, 142 S. Ct. 2228 at 2247 ("[W]e must guard against the natural human tendency to confuse what the Amendment protects with our own ardent views about the liberty that Americans should enjoy.").

To overcome all three of these hurdles is a monumental task reserved for only the most fundamental rights. The asserted right for parents to opt their children out of curriculum is not one of them.

1. ***A parental opt-out right is not rooted in this Nation's history and tradition.***

Recent cases that have applied the *Glucksberg* test have placed an emphasis on the state of the law as it was in 1868, the year the Fourteenth Amendment was adopted. *See Dobbs*, 142 S. Ct. at 2285 (providing an appendix "contain[ing] statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868."); *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136 (2022) ("The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right . . .").

Relevant cases from the late nineteenth century are inconsistent on whether it was a common practice for courts to find a parental opt-out right. Some courts ruled in favor of the

parents. *Morrow v. Wood*, 35 Wis. 59 (Wis. 1874) (holding that a teacher cannot compel a student to attend a geography class against the wishes of his parent); *Rulison v. Post*, 79 Ill. 567 (Ill. 1875) (bookkeeping class); *Trs. of Schs. v. People ex rel. Van Allen*, 87 Ill. 303 (Ill. 1877) (grammar class); *State ex rel. Sheibley v. Sch. Dist. No. 1*, 31 Neb. 552, 48 N.W. 393 (Neb. 1891) (grammar class).

Other courts ruled in favor of the schools. *Kidder v. Chellis*, 59 N.H. 473 (N.H. 1879) (holding that a school may compel a student to attend a public speaking class against the wishes of his parent); *State ex rel. Andrews v. Webber*, 8 N.E. 708 (Ind. 1886) (music class); *see also Guernsey v. Pitkin*, 32 Vt. 224 (Vt. 1859) (composition class); *Sewell v. Bd. of Educ.,* 29 Ohio St. 89 (1876) (rhetoric class).

The point here is not whether these cases were decided correctly, but to draw attention to the inconsistent and diverging opinions on the matter. On a level playing ground, whether it was a common practice for courts to allow parents to opt out their children is inconclusive. But the ground upon which a substantive due process right must be established is not level; it slants steeply away from the recognition of the asserted right. The difficulty of meeting both prongs of the *Glucksberg* test, combined with the Court's mandate to practice judicial restraint, requires clear and conclusive evidence of a history and tradition of parental opt-outs. The relevant early caselaw is inconsistent and does not support such a right.

Instead, historical evidence shows that parents have a duty, more so than a right, to educate their children, and that this duty falls within the scope of legislative control. In 1868, the constitutions of thirty-six out of thirty-seven states contained a provision requiring the state to provide a public school for minors. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights*

Are Deeply Rooted in American History and Tradition?, 87 Tex. L. Rev. 7, 108 (2008). Due to this near consensus, "it is fair to construe these clauses as in effect guaranteeing individuals a right to some kind of government provision of a public-school education." *Id.* In other words, children had, and therefore still have, a right to learn.

Because of this right to learn, any power that parents have over their children's education does not exist independently, rather, "[t]he power of parents over their children is derived from the former consideration, their duty." 1 William Blackstone, *Commentaries on the Laws of England* 440 (Univ. of Chicago Press 1979). An early Maine case supports this proposition, asserting that "this paternal power is not of the nature of a sovereign and independent power. . . . It is not a power granted to the parent for his benefit, but allowed to him for the benefit of the child." *Etna*, 8 F. Cas. 803, 804 (D. Me. 1838).

Historically, the state also had a duty to educate children, but the government's role was not for the benefit of the child only. The state had a "paramount interest in the . . . knowledge of its members, and that, of strict right, the business of education belongs to it." *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839); *see also State v. Shorey*, 86 P. 881, 882 (Or. 1906) ("[T]he state standing in the position of *parens patriae* . . . is a power which inheres in the government for its own preservation and for the protection of life, person, health and morals of its future citizens."). Additionally, the state has a history of acting in a compulsory manner when it comes to the well-being and education of children. Blackstone commented on English laws and practices that took children away from poor parents and "placed out by the public in such a manner, as may render their abilities . . . of the greatest advantage to the commonwealth." Blackstone, *supra* at 439. While children are not taken away from parents due to financial status today, the state still

rightfully inserts itself in cases where parents neglect their duty. Thus, the control a parent has over a child's upbringing was susceptible to restrictions by the state.

This was, in essence, the relationship between parent, child, and the state in the early United States. Children held a deeply rooted right to be educated, both parents and the state had a duty to educate them, and the state had power over parents in certain circumstances. Parents did not have an absolute right to control the entirety of a child's education, rather, "the power of a parent by our English laws is much more moderate." Blackstone, *supra* at 440. And a review of early caselaw and commentary reveals that the power to parent "is subject to the restraints and regulation of law." *Etna*, 8 F. Cas. at 804; *see also State v. Clottu*, 33 Ind. 409, 412 (1870) ("The subject [of parent-child relations] has always been regarded as within the purview of legislative authority."). Therefore, the notion that a parent has a deeply rooted right to take her child away from educational curriculum established by the state fails the history and tradition prong of the *Glucksberg* test.

2. ***A parental opt-out right is not implicit in the concept of ordered liberty.***

Even if it is found that there is a deeply rooted right for a parent to opt their child out of mandatory education, the right is not "'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [it were] sacrificed.'" *Glucksberg*, 521 U.S. at 721 (quoting *Snyder*, 291 U.S. at 105). As of now, the Supreme Court has not recognized a parental right to control their child's education to the point of opting him out of mandatory courses. Has liberty ceased to exist in education on a national scale? In states that have denied a right to parental opt-outs, has it been "impossible" to "maintain . . . a fair and enlightened system of justice?" *Palko*, 302 U.S. at 325. Reason implores a negative answer to both questions.

The *Dobbs* Court counselled that "ordered liberty sets limits and defines the boundary between competing interests." 142 S. Ct. at 2257. The Court then discussed how there are strong interests on all sides of the abortion debate, and that "people of the various States may evaluate those interests differently." *Id.* The same is true in the public education context. Some passionately believe that parents should play an active role in the classroom, including deciding the curriculum and teaching materials. Others vehemently disagree. Because opinions vary so broadly, allowing each state or locality to determine the policies and curriculum of each school is most appropriate. "Our Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated," *id.*, and the same is true in public education. To find that there is a constitutional right allowing parents to opt children out of curriculum would be to violate this ordered liberty and "usurp authority that the Constitution entrusts to the people's elected representatives." *Id.* at 2247 (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–26 (1985)).

Whether parents can opt their children out of the VAI pilot program at Garfinkel Elementary is a decision that should be made by the North Lile School Board and its superintendent, Mr. Rooney. Compared to the judiciary, school boards have all the advantages listed by Justice Scalia in his *Troxel v. Granville* dissent when discussing state legislatures, namely that they "do[] harm in a more circumscribed area . . . [are] able to correct their mistakes in a flash, and [are] removable by the people." *Troxel v. Granville*, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting). But if a federal circuit court were to rule that parental rights extend to curricular opt-outs, the decision would undermine the state's interest across a very great population. And even if the decision was best for some school districts, it would not be for others. This choice should remain with those who know the needs of students, parents, and

schools in the local system, thus preserving ordered liberty by allowing each school district to "set[] limits and define[] the boundary between competing interests." *Dobbs*, 142 S. Ct. at 2257.

The asserted constitutional right of a parental opt-out fails both prongs of the *Glucksberg* test and therefore should not be held to be a due process right protected by the Fourteenth Amendment.

B. **The *Meyer-Pierce* right does not encompass parental opt-outs.**

Against the backdrop of this history and tradition come *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Meyer* and *Pierce* hold that parents and guardians have a liberty interest in "direct[ing] the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534. It is often argued, as it was at the District Court below, that this *Meyer-Pierce* right this gives parents the constitutional right to opt their children out of certain curriculum. (R. at 5.) However, "identifying a general parental right is far different than concluding that it has been infringed," *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1042 (9th Cir. 2000), and the *Meyer* and *Pierce* opinions themselves do not paint with such broad strokes. The opinions stand for a much more modest idea: that the state cannot prevent children from being educated.

Meyer involved a Nebraska statute prohibiting the teaching of any language other than English in schools before the ninth grade. 262 U.S. at 396. Thus, the thrust of the Nebraska statute was to *prevent* children from being educated. In striking down the statute, the Court remarked that the liberty guaranteed by the Fourteenth Amendment Due Process Clause included "the right of the individual . . . to acquire useful knowledge." *Id.* at 399. The opinion repeatedly reiterated the value of education, *id.* at 400, and the Court also explained that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to

their station in life." *Id.* Finally, the Court asserted that there is a "right of parents to engage [teachers] so to instruct their children." *Id.*

Pierce also involved a statute restricting a child's educational opportunities, in this case requiring parents to send their children between the ages of eight and sixteen to a public school as opposed to a private school. 268 U.S. at 530. Relying upon the reasoning in *Meyer*, the Court ruled that the statute "interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children." *Id.* at 534–35. Statutes that prevented parents from employing qualified teachers to educate their children were thus unconstitutional.

Meyer and *Pierce* each explicitly recognized that at least some regulation over schools is acceptable. *See Meyer*, 262 U.S. at 402 ("The power of the state to . . . make reasonable regulations for all schools . . . is not questioned."); *Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the state reasonably to regulate all schools . . . to require . . . that certain studies plainly essential to good citizenship must be taught."). Further, the opinions "do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught." *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003).

The ideals espoused in *Meyer* and *Pierce*—that there is a constitutional right to learn, that knowledge is necessary to a functioning government, that government can regulate schools to promote education, and that parents have a duty to provide education for their children and have a right to employ teachers to that end—perfectly aligns with a correct historical understanding of the relationship between child, parent, and state. The Court surely recognized the balance that is needed between these competing interests. With the state threatening to tip the scales too far in its direction by imposing both a "curricular monopoly" and an "institutional" monopoly in a

manner that would restrict education, the Court rightly pushed back. Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 Neb. L. Rev. 290, 338 (2010).

Once one understands that *Meyer* and *Pierce* "evince the principle that the state cannot prevent parents from choosing a specific educational program," *Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525, 533 (1st Cir. 1995), it is evident that the *Meyer-Pierce* right does not extend to this case. Unlike the statutes in *Meyer* and *Pierce*, the VAI program neither involves a threat to a child's education nor prevents parents from choosing an educational program. Also, nothing is preventing parents from teaching their kids at home or finding a private school that better aligns with their values.

C. The circuit courts have overwhelmingly chosen not to extend the *Meyer-Pierce* right in a variety of school-related situations.

The Supreme Court has held that "neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *see also Norwood v. Harrison*, 413 U.S. 455, 461 (1973) ("Yet the Court's holding in *Pierce* is not without limits.").

Accordingly, the overwhelming majority of U.S. Courts of Appeals have declined to extend the *Meyer-Pierce* right in variety of school-related situations, allowing the state to exercise its *parens patriae* authority. *See Brown v. Hot, Sexy and Safer Prods.*, 68 F.3d 525 (1st Cir. 1995) (holding that a parent's *Meyer-Pierce* right did not encompass opting child out of sexually explicit AIDS awareness assembly); *Parker v. Hurley*, 513 F.3d 87 (1st Cir. 2008) (curricular materials encouraging respect for gay individuals and couples); *Leebaert v.*

Harrington, 332 F.3d 134 (2d Cir. 2003) (mandatory health education course); *Herndon v. Chapel Hill-Carrboro City Bd. of Ed.*, 89 F.3d 174 (4th Cir. 1996) (school district's mandatory community service program); *Littlefield v. Forney Ind. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001) (mandatory school uniform policy); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005) (mandatory school dress code); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005) (survey containing questions about sex); *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998) ("[P]arents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject.").

Like these seven circuits, this court should be "reluctant to expand the concept of substantive due process" in this context. *Collins*, 503 U.S. at 125. Doing so will provide more consistency across the country on parental rights in schools, and it is more aligned with a correct historical understanding of the relationship between child, parent, and state.

Perhaps the only outlier is the Third Circuit, but even that is questionable. In *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), a high school swimming coach repeatedly urged one of his athletes to take a pregnancy test. The Third Circuit ruled that this violated the rights of the student's mother because the topic of pregnancy was a matter of family relations that the state should not be involved in. *Id.* at 303. On the other hand, the Third Circuit in *C.N. v. Ridgewood Bd. of Ed.*, 430 F.3d 159 (3d Cir. 2017), held that a questionnaire seeking details about students' personal lives, including drug use, mental health, and sexual activity, was not of sufficient "gravity" to "rise to the level of a constitutional violation." *Id.* at 184–85. The court recognized a "distinction between actions that strike at the heart of parental decision-making on matters of the

greatest importance and other actions that, although perhaps unwise and offensive, are not of constitutional dimension." *Id.* at 184.

Even if this court were to decide this case under the Third Circuit standard, the decision in *Gruenke* is not controlling for at least two reasons. First, *Gruenke* can be factually distinguished from the case at bar, as well as the other circuit cases listed above, because it does not relate to education. While a health education class's curriculum, or even a school dress code, promotes education, a coach forcing a teenager to take a pregnancy test does not. Further, the coach in *Gruenke* made a one-off decision unlike the scenarios in any of the other circuit cases. The VAI program, which was instituted by the superintendent, planned by the teacher, and approved by the superintendent, falls in line with the other cases on a structural level.

Second, while some parents and students might consider learning about transgender issues "unwise and offensive," *Ridgewood*, 430 F.3d at 184, it is hardly comparable to the pressure and invasive nature of being asked to take a pregnancy test by one's coach. There is perhaps no other topic that implicates parental relationships more than a teenage pregnancy, and taking a pregnancy test requires specific action on the part of the individual. Education about gender identity is passive and simply does not connect to parental relationships to the same degree. If Ms. Reynolds were to ask a student to transition or to change gender identities, that would be comparable to *Gruenke* and certainly rise to the level of a constitutional violation. But nothing of the sort is in the curriculum.

Because the VAI program is factually similar to the cases to which courts have failed to find a parental opt-out right, and because the curriculum does not "strike at the heart of parenting," *Ridgewood*, 430 F.3d at 184, the *Meyer-Pierce* right does not extend to this context.

Applicant Details

First Name	**Jane**
Last Name	**Balkoski**
Citizenship Status	**U. S. Citizen**
Email Address	**jane.balkoski@berkeley.edu**
Address	**Address** Street **2741 College Ave.** City **Berkeley** State/Territory **California** Zip **94705** Country **United States**
Contact Phone Number	**415-535-5799**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2016**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Journal of Employment and Labor Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Padi, Manisha
Mpadi@berkeley.edu
5106425406
Berg, Cheryl
cberg@berkeley.edu
510-642-8100
Liu, Goodwin
Goodwin.Liu@jud.ca.gov
415-865-7090

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jane Balkoski
2741 College Avenue, Apartment 1
Berkeley, CA 94705
jane.balkoski@berkeley.edu

June 12, 2023

The Honorable Leslie A. Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3rd Floor
Albany, GA 31701

Dear Judge Gardner:

I am a rising third-year student at Berkeley Law, and I am writing to express my interest in clerking in your chambers from 2024 to 2026. I am particularly interested in working for you because I hope to learn from a judge who is committed to serving and protecting even the most disenfranchised members of the community. I also have family ties to the South and would like to practice in Georgia after graduation.

In law school, I externed for Justice Liu of the California Supreme Court. I enjoyed the fast-paced and autonomous nature of the work, which involved a wide variety of civil and criminal matters. My conversations with Justice Liu and his clerks convinced me that I would greatly enjoy clerking. The experience also helped me develop the research and writing skills expected of a clerk.

This summer, I am working at a plaintiffs' firm focused on employment discrimination and civil rights. Throughout law school, I have devoted my time to fighting for local workers through Berkeley's Union Grievance Assistance Project and Wage Justice Clinic. These projects were sobering reminders of how much work remains to be done to protect marginalized workers, and they cemented my commitment to a career in the public sector.

Before law school, I earned an undergraduate degree in literature at Yale, where I also served as an editor for the student paper. After completing a master's degree in medieval studies, I worked as a paralegal at a large plaintiffs' firm specializing in consumer and employment class actions.

I hope to continue honing my legal writing skills by clerking for a judge who shares some of these values. After clerking, I plan to spend my career advocating for low-wage workers and consumers at a private public interest firm or a government agency.

Respectfully,

Jane Balkoski

Jane Balkoski
2741 College Avenue, Berkeley, CA 94705 | 415.535.5799 | jane.balkoski@berkeley.edu

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
J.D. expected, May 2024
Honors: Jurisprudence Award: Torts (highest scoring exam), Best Brief: Written & Oral Advocacy (highest scoring brief), Dean's Fellowship (merit scholarship)
2023 Academic Distinction: top 5% of class; 2022 Academic Distinction: top 25% of class
Activities: *Berkeley Journal of Employment and Labor Law*, Union Grievance Assistance Project, Wage Justice Clinic

Trinity College, Dublin, Ireland
M.Phil. in Medieval Studies, April 2019
Dissertation: "The Book of Nature: Margins and Miniatures of CBL M 94"
Worked 20-40 hours/week to finance education.

Yale University, New Haven, CT
B.A., *cum laude,* in Literature, May 2016
Honors: Wright Prize (best descriptive, imaginative or journalistic article), Scott Prize (best essay in French), Kernan Prize, honorable mention (best senior essay in Literature department)
Activities: *Yale Daily News*, Yale College Writing Center, Peabody Museum of Natural History

EXPERIENCE

Sanford Heisler Sharp, Palo Alto, CA May 2023 to Aug. 2023
Summer Associate
Write demand letters and mediation briefs on behalf of clients who have experienced discrimination, retaliation, and wage theft. Correspond with clients. Prepare for depositions and mediations. Cite check briefs.

Chambers of Justice Liu, California Supreme Court, San Francisco, CA Jan. 2023 to Apr. 2023
Extern
Analyzed petitions for review and provided recommendations. Drafted bench memoranda regarding circulating opinions. Cite checked opinions. Completed legal research projects.

University of California, Berkeley, School of Law, Berkeley, CA Aug. 2022 to May 2023
Legal Research and Writing / Written and Oral Advocacy Tutor
Provided first-year students with feedback on legal research projects. Led practice oral argument sessions. Judged final first-year oral argument competition.

Department of Justice, Antitrust Division, San Francisco, CA May 2022 to July 2022
Volunteer Intern
Produced memoranda regarding legal issues, including the advice-of-counsel defense. Completed legislative history research projects. Reviewed documents.

Lieff Cabraser Heimann & Bernstein, New York, NY Jan. 2020 to July 2021
Paralegal / Case Clerk
Investigated potential cases for products liability practice group. Answered class members' questions about settlements. Coordinated with settlement administration companies. Drafted administrative motions.

SKILLS & INTERESTS

Languages: Fluent French, proficient Italian
Interests: Keen baker and avid hiker

Berkeley Law
University of California
Office of the Registrar

Sophia J Balkoski
Student ID: 3037256931
Admit Term: 2021 Fall

Printed: 2023-06-10 21:11

Academic Program History
Major: Law (JD)

Awards

Written & Oral Advocacy: Best Brief 2022 Spr

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure Linda Krieger	5.0	5.0	HH
LAW	201	Torts Talha Syed	4.0	4.0	HH
LAW	202.1A	Legal Research and Writing Cheryl Berg	3.0	3.0	CR
LAW	202F	Contracts Asad Rahim	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2022 Spring

Course		Description	Units	Law Units	Grade
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Cheryl Berg	2.0	2.0	HH
LAW	203	Property Molly Van Houweling	4.0	4.0	H
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Erwin Chemerinsky	4.0	4.0	P
LAW	230	Criminal Law Andrea Roth	4.0	4.0	H
LAW	284.42	Credit Reporting&Economic Just Erika Heath	1.0	1.0	CR

	Units	Law Units
Term Totals	15.0	15.0
Cumulative Totals	31.0	31.0

2022 Fall

Course		Description	Units	Law Units	Grade
LAW	231	Crim Procedure-Investigations Erwin Chemerinsky	4.0	4.0	HH
LAW	243	Appellate Advocacy **Fulfills Writing Requirement** Alexandra Robert-Gordon	3.0	3.0	HH
LAW	247.11	Consumer Financial Regulation **Fulfills 1 of 2 Writing Requirements** Manisha Padi	3.0	3.0	HH
LAW	252.2	Antitrust Law Prasad Krishnamurthy	4.0	4.0	H

	Units	Law Units
Term Totals	14.0	14.0
Cumulative Totals	45.0	45.0

2023 Spring

Course		Description	Units	Law Units	Grade
LAW	289A	Judicial Externship Seminar **Units Count Toward Experiential Requirement** Erin Liotta Sharon Djemal Susan Schechter	1.0	1.0	CR
LAW	295.8B	Judicial Externships: Bay Area **Units Count Toward Experiential Requirement** Susan Schechter	11.0	11.0	CR

	Units	Law Units
Term Totals	12.0	12.0
Cumulative Totals	57.0	57.0

Carol Rachwald, Registrar

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Berkeley Law
University of California
Office of the Registrar

Sophia J Balkoski
Student ID: 3037256931
Admit Term: 2021 Fall

2023 Fall

Course		Description	Units	Law Units	Grade
LAW	223.1	Election Law	3.0	3.0	
		Units Count Toward Race and Law Requirement			
		Abhay Aneja			
LAW	227.11	Emp Arbitr:Law and Practice	2.0	2.0	
		Units Count Toward Experiential Requirement			
		Barry Winograd			
LAW	241	Evidence	4.0	4.0	
		Jonah Gelbach			
LAW	244.1	Adv Civ Pro:Complex Civil Lit	4.0	4.0	
		Andrew Bradt			

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	57.0	57.0

Carol Rachwald, Registrar

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University of California
Berkeley Law
270 Simon Hall
Berkeley, C 94720-7220
510-642-2278

KEY TO GR DES

1. Grades for cademic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GP s) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

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May 19, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am writing to convey my enthusiastic support for Jane Balkoski's application for a clerkship.

Jane took my course on Consumer Financial Regulation during the Fall 2022 semester. This course provides an interdisciplinary overview of consumer finance. Over the past few decades, households have faced the mounting pressures on their finances due to mortgages, student loans, credit cards, healthcare, long term care, and inadequate retirement income. The course teaches the economic underpinnings of how consumers make financial decisions and traces out existing consumer protection efforts targeting financial products, focusing on particular markets where recent regulations have been passed. Students are required to write a 15-20 page paper on a topic of their choice, culminating with a proposed policy change.

Right from the beginning of class, Jane distinguished herself by participating regularly and pursuing conversations about consumer law and related issues outside of class. She regularly drew on her own background in the service industry and as a paralegal in a plaintiff-side firm to illuminate our discussions with real-life examples. Jane also challenged herself to choose a topic with a difficult set of technical issues to discuss in her final paper – the market for reverse mortgages. She found that reverse mortgage customers needed counseling before they could access their own home equity, which erected a significant barrier for elderly homeowners to finance their retirement. Jane carefully explained reverse mortgages and the key regulations, concluding that counseling requirements would have to be modified in order to be effective.

Jane's work in my class was excellent, and put her in the top half of students across the top 10 law schools I have been affiliated with. She is creative, diligent, and has a knack for identifying the key feature of a complex system, abstracting away from the less important details. Moreover, Jane is excellent at incorporating feedback on her writing. Our class paper required two drafts with individualized feedback, and Jane was able to significantly improve the paper in response to comments.

Jane has also distinguished herself outside of my class. She was given academic honors for being in the top 25% of her class. She is an editor for the Berkeley Journal of Employment and Labor Law and has completed a judicial externship. Jane plans to spend her career working for a state or federal agency. I have no doubt that she will continue to use her skills in research, analysis, and writing to do fantastic work in her clerkship and future career opportunities.

I highly recommend Jane for this position. I am happy to provide further details upon request, either by email or via phone at 518-526-6700.

Best regards,

Manisha Padi

Manisha Padi - Mpadi@berkeley.edu - 5106425406

May 15, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Re: Jane Balkoski

Dear Judge Gardner:

I highly recommend Jane Balkoski for a judicial clerkship in your chambers.

I had the pleasure of teaching Jane during her first-year legal writing courses at Berkeley Law, and of supervising her this year as one of my two teaching assistants. In both contexts, Jane has been a standout, showing herself to be smart, capable, and collegial. I believe Jane has the talent and traits necessary to be a successful judicial clerk and that she would be a positive addition to your chambers.

While she was my student, Jane showed herself to be a nimble thinker and an efficient researcher. She quickly understood each of the various substantive problems she analyzed in my classes, even as those problems became more complex. She located the key cases for each problem and correctly interpreted those cases to understand their significance. Finally, Jane effectively used the cases she selected. In the spring, she framed the cases in her brief accurately but persuasively to support her client's position in a FOIA case, demonstrating both her creativity as an advocate and her caution never to overstate or misstate the law. I believe that Jane has the research and analytical skills to be an extremely effective judicial clerk.

Jane is also a talented legal writer. The final brief she produced last spring was polished and readable. She was able to express her points clearly and concretely without wasted words, making her argument a pleasure to read. Indeed, Jane's final brief earned the top score (and Best Brief award) in her section. A practicing attorney could have filed Jane's final brief with justifiable pride. This year, Jane continued to hone her writing skills as a judicial extern for California Supreme Court Justice Goodwin Liu. If I were still practicing law, I would feel confident assigning complex writing projects to Jane.

Jane's transcript makes clear that she is a successful student. Her academic success comes as no surprise to me. While she was my student, Jane showed herself to be a smart learner. She came frequently to my office hours with thoughtful questions and seeking critiques of her draft work. She showed herself to be coachable, quickly understanding and implementing my suggestions about how her work could improve. She therefore was able to master the new skills necessary for effective legal analysis and writing before many of her peers.

This year, Jane was a valuable addition to my classes as a teaching assistant. In this role, Jane assisted students during in-class research exercises and other collaborative activities, provided individualized feedback about students' work, conducted office hours, helped students prepare for oral arguments, and judged students during final oral arguments. My students described her as "awesome," "excellent," and "amazing." They praised her for being "super helpful" and for being "very kind and honest." And they praised her "very detailed" feedback on their work. I was similarly impressed. Jane efficiently managed her work (even while juggling other commitments). She worked independently but also kept me informed of student issues she encountered. I feel lucky to have worked with her!

Finally, I have enjoyed coming to know Jane over the last two years. In addition to being smart and skillful, Jane is thoughtful, kind, and funny. She is generous with her time and is viewed as a mentor by more junior law students. I look forward to keeping in touch with Jane after law school and seeing where her career will lead!

I expect Jane will be as successful in her legal career as she has been in her legal studies, and highly recommend her for a clerkship. Please feel free to contact me if you have any questions, or if I can provide any further information.

Sincerely,

Cheryl Dyer Berg
Professor of Legal Writing
Legal Research, Analysis, and Writing Program
University of California, Berkeley School of Law

Supreme Court of California
350 McALLISTER STREET
SAN FRANCISCO, CA 94102- 4797

GOODWIN LIU
ASSOCIATE JUSTICE

(415) 865 -7090

May 9, 2023

Dear Judge,

I am pleased to recommend **Jane Balkoski** for a clerkship in your chambers. Jane served as an extern in my chambers during the spring of 2023 and worked on a wide range of legal research and writing assignments. My law clerks and I found her to be an excellent extern, and I urge you to give her careful consideration.

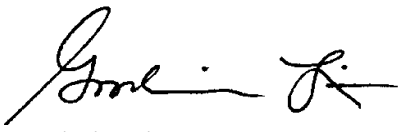
Jane assisted my law clerks with a number of bench memos and weekly analyses of petitions for review, on topics ranging from criminal procedure to voting rights to employment law to tort immunity for government officials. In her assignments, she consistently demonstrated her skills as a strong researcher, analyst, and writer. Here is a sampling of my clerks' reviews of her work: "Jane was excellent and really exceeded my expectations. She was responsive and hardworking and receptive to feedback. Her work product was very good and reliable." "I found her legal research and analysis to be strong; she identified the correct universe of cases and was able to apply the principles from them deftly." "She is a good researcher, a fantastic writer and has a sharp legal mind." "She has a great attitude, is very efficient, and implements feedback well." I agree with these impressions and would add that few externs (I typically have 6-8 per year) get such strong evaluations from my busy and demanding clerks.

Jane's humanities background before law school has served her well, especially when it comes to writing. As an undergraduate at Yale, she won two writing prizes and an honorable mention for a third prize. In light of her impressive writing skills, I am not surprised that she was selected to be a legal research and writing tutor in law school and thrived in that role. At UC Berkeley, Jane has achieved a strong academic record and will serve as Managing Editor of the *Berkeley Journal of Labor & Employment Law*, among other activities. Her leadership role on the journal builds on her prior work on workers' rights issues at the Wage Justice Clinic in Berkeley and the Lieff Cabraser firm, and I expect she

will pursue a career in government or the nonprofit sector with a focus on economic justice issues.

In sum, I am very impressed with Jane and appreciate her valuable contributions to my chambers' work. She is a strong clerkship candidate, and I hope you will invite her for an interview.

Sincerely,



Goodwin Liu

Jane Balkoski – Writing Sample

Note: I was tasked with writing the State's opening brief in *Taking Offense v. State of California*, a case currently pending before the California Supreme Court, for an appellate advocacy course. At issue is a bill that criminalizes willful and repeated misgendering in long-term care facilities. The research, analysis, and writing are substantially my own, though my professor provided high-level comments on a draft. Where indicated, portions of this brief have been eliminated for the purpose of brevity. I would be happy to provide the complete brief upon request.

INTRODUCTION

Isolation, poverty, homelessness, and premature institutionalization plague California's lesbian, gay, bisexual, transgender and queer (LGBTQ) seniors. Because these seniors have experienced abuse and harassment within long-term care facilities (LTCFs), they avoid the elder programs and services that would provide invaluable medical care. This vulnerable population is progressively becoming more vulnerable. The California Legislature passed Senate Bill No. 219 (SB 219) in order to address these urgent issues. Though state and local laws already proscribed disparate treatment and discrimination in public accommodations on the basis of gender identity and sexual orientation, these laws had not successfully eradicated harassment within LTCFs. Staff continued to withhold from LGBTQ residents the privileges granted to straight and cisgender residents; they discharged LGBTQ residents abruptly, harassed them, and referred to them by the wrong names and pronouns. In short, staff denied them dignity and autonomy.

Under SB 219, LTCF staff cannot engage in certain "discriminatory acts" targeting LGBTQ seniors. In relevant part, the misgendering provision prohibits staff from "willfully and repeatedly" misgendering an LGBTQ resident or failing to use the resident's preferred name after being clearly informed of a resident's preference. Before the law could go into effect, however, Taking Offense, an association of "at least one California citizen and taxpayer who has paid taxes to the state within the past year,"

brought a facial challenge to the misgendering provision in state court, alleging that it violated the First Amendment of the United States Constitution and Article I of the California Constitution.

Because the misgendering provision is a constitutional exercise of California's police powers, the facial challenge must fail. The First Amendment does not prohibit states from regulating discrimination within their borders, especially when the discrimination targets unwilling listeners in their home. Nor does the First Amendment prohibit states from regulating how caretakers treat their elderly patients. Even if the First Amendment did protect an employee's right to use incorrect pronouns, the provision would survive both intermediate scrutiny and strict scrutiny. As both the trial court and the Court of Appeal noted, the State has a compelling interest in protecting vulnerable LGBTQ seniors. Though the Court of Appeal held otherwise, the misgendering provision is narrowly tailored to further that interest: it applies only in limited circumstances, leaving open many alternative channels of communication. Given these limits, the misgendering provision is neither unconstitutionally overbroad nor void for vagueness.

Until the misgendering provision goes into effect, LGBTQ seniors will remain at high risk for institutionalization and homelessness. They will continue to avoid facilities and services that provide much-needed medical care. Ultimately, affirming the Court of Appeal's holding would undermine a valid exercise of California's power to regulate the health care professions. For these reasons, we ask this Court to reverse the Court of Appeal.

STATEMENT OF FACTS AND OF THE CASE

[Omitted for brevity]

STANDARD OF REVIEW

[Omitted for brevity]

ARGUMENT

The right to free speech is not absolute. *Near v. Minnesota*, 283 U.S. 697, 701 (1931). The First Amendment generally protects a person's right to speak, but its protections do not shield all speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992); *Aguilar v. Avis Rent A Car System*, 21 Cal.4th 121, 134 (1999). Speech that rises to the level of discrimination, for instance, receives no First Amendment protection. *Aguilar*, 21 Cal.4th at 134-35. In addition, the First Amendment does not limit the government's power to regulate certain professions or protect vulnerable citizens from inadequate care in medical facilities. *See Nat'l Inst. of Family and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (NIFLA); *Shea v. Bd. Of Med. Exam'r*, 81 Cal. App. 3d 564, 577 (1978).

If a statute infringes on constitutionally protected speech, then the statute must survive either intermediate scrutiny or strict scrutiny. Strict scrutiny applies to content-based regulations of speech, which "single out [a] topic or subject matter for differential treatment." *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015); *City of Austin v. Reagan Nat'l Advertising of Austin*, 142 S. Ct. 1464, 1472 (2022). Conversely, content-neutral regulations, which may involve a "cursory" examination of speech in service of drawing neutral, location-based lines, need only survive intermediate scrutiny. *Hill v. Colorado*, 530 U.S. 703, 722 (2000).

Ultimately, First Amendment protections form a "spectrum." *Perry Ed. Assn v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). On the one hand, the government may not prohibit citizens from protesting on public city streets. *United States v. Grace*, 461 U.S. 171 (1983). On the other, First Amendment protections are at a low ebb in the workplace and in the home, where "strong public policies" justify certain regulations. *Aguilar*, 21 Cal.4th at 155 (Werdegar, J., concurring). The "potential for even subtle coercion" allows the State to place greater restrictions on

unwelcome and discriminatory speech in the workplace. *Id.* at 158 (Werdegar, J., concurring). And under the captive audience doctrine, intermediate scrutiny applies to regulations of unwelcome speech infiltrating the home. "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980).

In enacting SB 219, California has regulated speech unprotected by the First Amendment. Not only is misgendering harassment directed at a captive audience, but the use of pronouns is part of the practice of caretaking in LTCFs. The State has simply clarified the scope of existing laws that already prohibit disparate treatment. JA 021. Further, even if the First Amendment did apply to the misgendering provision, it need only survive intermediate scrutiny. Unlike the content-based restriction at issue in *Reed*, the provision is a content-neutral regulation. Because it is narrowly tailored to further California's compelling interest in protecting vulnerable seniors, it would survive both intermediate scrutiny and strict scrutiny. The provision is neither unconstitutionally overbroad nor void for vagueness.

I. Because the Misgendering Provision Is Constitutional, the Facial Challenge Must Fail.

Taking Offense brings a facial challenge to the misgendering provision, but it cannot meet the heavy burden that applies to such a challenge. Facial invalidation is "strong medicine" that courts only employ as a "last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). A court evaluating a facial challenge looks only to "the text of the measure itself, not its application to the particular circumstances of an individual." *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1084 (1995).

California courts have applied two alternative tests to determine whether a law is unconstitutional on its face. Under the stricter test, the

party bringing the challenge must establish that the statute "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions." *Coffman Specialties, Inc. v. Dept. of Transp.*, 176 Cal. App. 4th 1135, 1145 (2009) (citation omitted). Under the second, more lenient test, the party must show that the provision "conflicts with constitutional principles in the generality or great majority of cases." *Id.* (citation and internal punctuation omitted). The party "cannot prevail [under either test] by suggesting that in some future hypothetical situation" the application of the statute could lead to constitutional problems. *Id.*

Here, Taking Offense has failed to meet its heavy burden, even under the more lenient test. As described below, Appellant has not shown that the misgendering provision conflicts with constitutional principles in most instances.

II. Unimpeded by the First Amendment, California May Regulate Discriminatory Professional Conduct Directed at Vulnerable Citizens.

The misgendering provision is an unremarkable exercise of California's police powers. First, it applies only to LTCF staff who are at work. The statute does not regulate visitors, residents, or staff when they are not at work. Second, only an employee who willfully and repeatedly misgenders a resident after being clearly informed of a resident's preferences violates the statute. Third, staff remain free to discuss gender and sex with residents.

California may proscribe misgendering within these facilities for three reasons. First, the State may regulate speech that produces certain "special harms." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). Repeated and willful misgendering causes one such special harm: unequal access to care. Second, California may protect residents from unwelcome speech that infiltrates LTCFs, where seniors are uniquely vulnerable.

Finally, the State can regulate how caretakers treat residents. Not only is the provision a permissible regulation of the health care professions, but the State has already prohibited disparate treatment within LTCFs. JA 021. SB 219 simply clarifies that repeated and willful misgendering is impermissible disparate treatment.

A. Willful and Repeated Misgendering Is Discrimination that Receives No Constitutional Protection.

In enacting SB 219, California has properly targeted "invidious discrimination" that is not entitled to constitutional protection. *Jaycees*, 468 U.S. at 628. States may regulate discrimination if they do not target acts "on the basis of . . . expressive content." *R.A.V.*, 505 U.S. at 389; *In re M.S.*, 10 Cal. 4th 698, 723 (1995). As this Court recognized in *Aguilar*, speech that rises to the level of discrimination is not constitutionally protected, and speech becomes discrimination if it produces "special harms distinct from [its] communicative impact." 21 Cal.4th at 134-35; *Jaycees*, 468 U.S. at 628. Courts determining whether acts produce these "special harms" look to the broader social effects of the conduct. *Id.* Here, willful and repeated misgendering within LTCFs engenders unequal access to care.

In *Harris v. Forklift Systems, Inc.*, the Supreme Court held that purely verbal insults and innuendos rose to the level of discrimination and created a hostile work environment in violation of Title VII. 510 U.S. 17, 23 (1993). Plaintiff's supervisor repeatedly insulted her because of her gender. *Id.* at 19. He said, "You're a woman, what do you know," and "We need a man as the rental manager." *Id.* Without addressing the First Amendment, the Court held that his speech rose to the level of discrimination because of its pernicious and wide-ranging effects on society: "A discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Id.* at

22. The manager's speech rose the level of discrimination because of these "tangible effects," distinct from communicative harm. *Id.*

In *Aguilar*, this Court also recognized that the First Amendment did not protect offensive speech that rose to the level of discrimination. 21 Cal.4th at 121. A manager repeatedly "demeaned" his employees by using racial epithets in the workplace. *Id.* The majority explicitly addressed the issue of whether speech alone could constitute discrimination in violation of state and federal laws. *Id.* at 135. Citing to *Harris* and *R.A.V.*, this Court held that the manager's speech violated both Title VII and the Fair Employment and Housing Act (FEHA) and thereby enjoyed no constitutional protection. *Id.* at 137. The manager's speech "permeat[ed]" the workplace with "discriminatory intimidation, ridicule and insult." *Id.*

In substance and effect, SB 219 resembles the discrimination laws analyzed in *Harris* and *Aguilar*. California has not targeted repeated and willful misgendering on the basis of its "expressive content." *R.A.V.*, 505 U.S. at 389-90. The statute itself indicates that the California Legislature has not targeted expressive speech; instead, it has specified "prohibited discriminatory acts." JA 022. The stated purpose is simply "to accelerate the process of freeing LGBTQ residents and patients from discrimination," not to eliminate certain conversation topics from these facilities. *Id*. Crucially, SB 219 does not prohibit conversations about gender and sex in LTCFs.

California has determined that willful and repeated misgendering rises to the level of discrimination because it produces certain "special harms." *See Jaycees*, 468 U.S. at 628. These "special harms" are distinct from communicative impact—they are harms to the community as a whole. *See id.* Just as the *Harris* Court did not confine itself to a study of the plaintiff's psychological state but instead recognized that sexist language in the workplace led to broader societal issues—women stagnating

professionally and dropping out of the workforce—California has looked beyond the psychological effects of misgendering to the "unique evils" that the conduct engenders. *Jaycees*, 468 U.S. at 628; *see Harris*, 510 U.S. at 22. Misgendering in LTCFs has caused LGBTQ seniors to forego care and increased each senior's risk of institutionalization and poverty. JA 022-023. Repeated and willful misgendering is unprotected discrimination because it triggers these "tangible" societal harms. *See Harris*, 510 U.S. at 22.

B. California May Protect Unwilling Listeners Within the Home.

Vulnerable LGBTQ residents are not required to welcome unwanted speech into the home. Under the captive audience doctrine, the State may protect listeners who cannot avoid an unwelcome message. "Even if the speaker enjoys the right to free speech, he or she has no corollary right to force people to listen." *Aguilar*, 21 Cal. 4th at 159. *See, e.g. Rowan v. Post Office Dept*., 397 U.S. 728 (1970). As demonstrated below, while this Court and the Supreme Court have not expressly held that intermediate scrutiny is the appropriate level of review for a regulation that protects a captive audience, in practice the captive audience doctrine appears alongside the application of intermediate scrutiny. LGBTQ residents form a captive audience because they reside in LTCFs, but the doctrine also applies because the residents are unusually vulnerable. Each facility is at once a home and a hospital.

In *Frisby v. Schultz*, the Court upheld an ordinance prohibiting picketing in front of an individual's residence, recognizing the homeowner's right to privacy. 487 U.S. 474, 488 (1988). The municipality adopted the provision because protestors had gathered outside of the home of an abortion provider, generating both controversy and complaints. *Id.* at 476. The Court acknowledged that the ordinance proscribed picketing on public streets, a traditional public forum, but it held that the state had a

heightened interest in protecting the privacy and tranquility of the home. *Id.* at 484. Of particular importance to the *Frisby* Court was the "focused" nature of the picketing. Id at. 476. Picketers wanted to "intrude upon the targeted resident, and to do so in an especially offensive way." *Id.* at 486. In the Court's view, to strike down the ordinance would be to make the home "something less than a home." *Id.* (citation omitted).

Similarly, the *Hill* Court applied the captive audience doctrine to a law protecting citizens seeking medical treatment. 530 U.S. at 717. The statute prohibited a person from knowingly getting within eight feet of another person outside a health care facility "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling." *Id.* at 707. Citing *Frisby*, the Court extended the captive audience doctrine to health care facilities and their immediate surroundings, holding that the state had the power to protect a citizen's "right to be let alone." *Id.* at 717. In the Court's view, unwanted confrontations could trigger "trauma" in the unwilling listeners, many of whom were already under "emotional strain and worry." *Id.* at 716. The Court held that the ordinance survived intermediate scrutiny. *Id.* at 730.

In her concurring opinion in *Aguilar*, Justice Werdegar also understood the captive audience doctrine to apply outside the home. 21 Cal.4th at 160. Pointing to numerous cases in which the United States Supreme Court cited "an audience's captivity as a factor justifying limitations on speech," she posited that the Avis employees formed a captive audience. *Id.* (citations and internal punctuation omitted). In Justice Werdegar's view, the doctrine was not "reserved for situations in which listeners are physically unable to leave." *Id.* at 161. Instead, it applied because employees were not "reasonably free to walk away." *Id*. at 160. Employees were not required to "sacrifice their employment" to avoid unwelcome speech. *Id.* at 161.

In enacting SB 219, California has regulated unwelcome speech in the home. Because older LGBTQ citizens reside in LTCFs, each facility is a "citadel of the tired, the weary, and the sick." JA 022; *see Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969). The State must have the same interest in protecting LGBTQ seniors in LTCFs as it has in protecting homeowners within their homes. To hold otherwise would be to treat seniors as second-class citizens, unworthy of the State's protection. Given that the government in *Frisby* permissibly regulated picketing on public streets, just outside the home, California may regulate conduct occurring within the home. *See Frisby*, 487 U.S. at 474.

The State, in fact, has a heightened interest in protecting these citizens because LTCFs sit at the intersection of the home and the hospital. Seniors in LTCFs are in "vulnerable physical and emotional conditions," much like the citizens seeking medical care in *Hill*. *See* 530 U.S. at 728-30. Residents discuss new medications and treatment plans with health care professionals. They report symptoms and receive diagnoses. The government in *Hill* wanted to limit "trauma to patients"—California, too, seeks to minimize the trauma that accompanies misgendering and abuse in LTCFs. *Id.* at 716. In addition, by entering these facilities, seniors have sacrificed much of their privacy and agency. Taking Offense acknowledges in its Petition for Writ of Mandate that many residents must "share intimate living space." JA 012. Indeed, residents cohabitate with strangers, share meals with strangers, and watch television alongside strangers. "The impact of using inappropriate pronouns is even more offensive and hurtful when it occurs in an environment where one cannot choose the persons with whom one associates." *Taking Offense v. State*, 66 Cal. App. 5th 696, 732 (2021) (Robie, J., concurring). Unlike the homeowner in *Frisby*, these seniors do not enjoy complete tranquility and solitude. *See* 487 U.S. at 474.

Instead, the "potential for even subtle coercion" lurks within LTCFs. *See Aguilar*, 21 Cal.4th at 158. Residents are physically dependent on caretakers, just as the *Aguilar* employees were economically dependent on their manager. JA 022; *see Aguilar*, 21 Cal.4th at 158. Should an employee object to demeaning language, the manager may retaliate, by cutting her hours or firing her. Should a resident object to the use of incorrect pronouns, a nurse or counselor may retaliate by providing worse care. As Justice Werdegar noted in her concurrence, the employee is not expected to quit her job to avoid unwelcome speech. By the same logic, an LGBTQ resident need not abandon her home in order to avoid demeaning language.

The Court of Appeal erred in two ways when it held that LTCF staff also formed a captive audience. Slip Op. 18. First, the Court of Appeal failed to recognize that staff can still discuss gender in the workplace. Second, the court did not acknowledge that the provision applies only when staff members are at work. Because they are free to express their views in any number of ways and in any number of places, they do not form a captive audience. Employees are not required to "walk off the job to avoid unwanted speech," but they may not use demeaning language in the workplace simply because "people need to work. . . ." *Aguilar*, 21 Cal.4th at 161. Unlike LTCF staff, however, residents cannot "repair to escape from the tribulations of their daily pursuits" at the end of the day. *Carey*, 447 U.S. at 471. The facility is their only refuge.

C. The State May Proscribe Disparate Treatment by Caretakers Within LTCFs.

The misgendering provision prohibits LTCF staff from treating LGBTQ residents and straight or cisgender residents differently. States may place an incidental burden on speech that is "part of the practice" of a profession. *NIFLA*, 138 S. Ct. at 2373. The states and the federal government already require staff in medical facilities to provide the same

care to all patients, regardless of gender identity or sexual orientation. JA 021. In enacting SB 219, California has clarified how caretakers can practice within the state without expanding the scope of existing laws governing health care facilities.

In *NIFLA*, the Court held that the First Amendment did not apply to regulations of professional conduct incidentally burdening speech. 138 S. Ct. at 2373. The law at issue in the case, requiring pregnancy crisis centers to share information about low-cost family planning services, did not meet those requirements. The notice requirement was not "tied" to a procedure. *Id.* Had it been more closely related to a procedure and applied to other facilities providing identical services, then it would have passed muster. *Id.* In striking down the regulation, the Court held that other ordinances, including informed consent requirements in the medical context, permissibly burdened some speech. *Id.*

Applying that same reasoning, the Ninth Circuit upheld a regulation of professional conduct that burdened some speech. *Tingley v. Ferguson*, 47 F.4th 1055, 1091 (9th Cir. 2022). The court concluded that a statute prohibiting mental health professionals from practicing conversion therapy regulated "only treatment." *Id.* at 1073. In support of this holding, the court pointed to a "long . . . tradition" of regulations governing health care practitioners within state borders. *Id.* at 1080. The court emphasized that a contrary holding would endanger other regulations, including malpractice laws. In the court's view, regulations were particularly important in the health professions because practitioners could cause "physical and psychological" harm to those under their care. *Id.* at 1081. *See, e.g., Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d 1090 (2017) (finding that repeated misgendering by hospital staff that led to a young person's suicide could violate the Affordable Care Act, the Unruh Civil Rights Act and Section 11135 of the California Government Code).

Because of this risk, states have imposed significant regulations on health care practitioners' speech from "time immemorial." *Tingley*, 47 F.4th at 1083; *see also Shea*, 81 Cal. App. 3d at 577 (holding that the "First Amendment is not an umbrella" shielding doctors who make unprofessional comments from liability).

Much like the conversion therapy prohibition in *Tingley*, the misgendering provision regulates how LTCF caretakers can practice their profession. *See Tingley*, 47 F.4th at 1073. The treatment at issue in Tingley involved words, but the court reasoned that psychotherapy was "more than just talking." *Id.* at 1082. Tingley could not escape regulation simply because he practiced psychotherapy with words. *Id.* Many LTCF employees, including nurses, doctors, therapists, and social workers, also practice through speech: they speak with residents on a regular basis about physical ailments, mental health, and treatment plans. The State already regulates and may continue to regulate those conversations. Under California law, for instance, doctors cannot peddle snake oil or mischaracterize medications. Cal. Health & Safety Code § 110390. In enacting the misgendering provision, the State has simply regulated a few isolated words—pronouns—uttered pursuant to the practice of a caretaking profession.

But more broadly, both California and the federal government have already prohibited disparate treatment within LTCFs. Under the California Government Code, for instance, no person can be denied "full and equal access to services" that receive state funding. Cal. Gov't Code § 11135. The Affordable Care Act also prohibits health care providers from denying a person benefits on the basis of sex or gender. 42 U.S.C. § 18116. In order to abide by these laws mandating equal treatment, any LTCF staff member, including an administrative employee who rarely speaks with residents, must refer to LGBTQ seniors by their preferred pronouns. A staff member

who fails to do so but refers to a cisgender resident by the correct pronoun violates state and federal laws.

Though other laws already prohibit disparate treatment in LTCFs, California enacted SB 219 because a specific evil—unequal access to care—persisted despite these laws. As evidenced by the findings preceding SB 219, the California Legislature found that existing laws had not successfully eradicated disparate treatment in LTCFs. JA 022. The State enacted SB 219 in order to "accelerate the process of freeing LGBT [seniors] from discrimination." *Id.* Not only does *Prescott* show that misgendering in health care facilities violates state and federal laws other than SB 219, but the facts of the case speak to the inadequacy of those laws. 265 F. Supp. 3d at 1096-97. Had the Affordable Care Act successfully deterred misgendering within medical facilities, then hospital staff would have used the young patient's preferred pronouns. *Id.* California enacted the misgendering provision in order to put a stop to similar conduct in LTCFs.

California has broad authority to regulate professional conduct within medical facilities, unimpeded by the First Amendment. SB 219 shields LGBTQ seniors from unwelcome and harassing speech within LTCFs, where they are unusually vulnerable.

III. The Court of Appeal Erred in Concluding that the Provision Was a Content-based Regulation of Speech.

[Omitted for brevity]

A. *Reed* Applies to Regulations in Public Spaces.

[Omitted for brevity]

B. Even Under *Reed*, the Provision Is a Content-neutral Regulation of Speech.

[Omitted for brevity]

i. The Provision Is Facially Content Neutral Because It Simply Draws Location-based Lines.

[Omitted for brevity]

ii. California Did Not Enact the Provision due to Disagreement with Gender Essentialism.

[Omitted for brevity]

IV. The Provision Survives Intermediate Scrutiny Because It Is Narrowly Tailored to Further California's Interests in Protecting Seniors and Eradicating Discrimination.

[Omitted for brevity]

A. California Has a Compelling Interest in Eliminating Discrimination and Safeguarding the Health of its Seniors.

[Omitted for brevity]

B. The Provision Is Not Substantially Broader than Necessary Because It Leaves Open Ample Alternative Channels of Communication.

[Omitted for brevity]

V. The Provision Is Sufficiently Tailored to Survive Even Strict Scrutiny.

[Omitted for brevity]

VI. Because the Provision Does Not Criminalize a Substantial Amount of Protected Expressive Activity, It Is Not Overbroad.

[Omitted for brevity]

VII. The Provision Is Not Vague Because a Person of Reasonable Intelligence Would Understand its Prohibitions.

[Omitted for brevity]

CONCLUSION

At the end of each work day, the nurses, counselors, and janitors who work in LTCFs go home. At home, they may spend the evening with their closest friends, or conversely, when the doorbell rings, they may choose not to answer it. At home, in "the most private of places," they are at once safe from the outside world and free to act as they please. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). Because LGBTQ seniors residing in LTCFs deserve that same freedom and safety, the State of California respectfully asks this Court to reverse the Court of Appeal.

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Leslie Abrams Gardner
United States District Court
Middle District of Georgia
C.B. King U.S. Courthouse
210 West Broad Avenue
Albany, Georgia 31701

Dear Judge Abrams Gardner:

I am currently a second-year student at the University of Texas School of Law, and I am pleased to apply for a clerkship position in your chambers for the 2024-term. It is my wish to work as a public interest litigator in the South after I graduate, so I am particularly interested in clerking for you because of the location of your chambers, as well as your dedication to voters' rights advocacy.

Throughout my life I have overcome adversity through hard work, determination, and the support of my family, friends, and mentors. I will not only contribute to your chambers by my demonstrated work ethic and research and writing abilities, but also my multicultural background. As a Black and Mexican-American woman raised in the binational community of El Paso, Texas, I have always known that as an attorney, I want to serve the communities that raised me – the Black and Latinx communities. It is my goal to use my law degree to connect with, advocate for, and empower marginalized communities in the South.

My application includes a resume, transcript, and writing sample. Letters of recommendations by Mrs. Jacquelyn Davis, Professor Lori Mason, and Professor Lia Sifuentes Davis are included. These recommenders may be reached as follows:

- Jacquelyn Davis, Texas RioGrande Legal Aid, JDavis@trla.org, 512-374-2756
- Professor Lori Mason, The University of Texas School of Law, LMason@law.utexas.edu, 512-232-1335
- Professor Lia Sifuentes Davis, The University of Texas School of Law, Lia.Davis@law.utexas.edu, 512-232-7222

In addition, the Law School's clerkship advisor, Kathleen Overly, is available to answer your questions. You may reach her at koverly@law.utexas.edu or 512-232-1316. If I may provide any additional information, please contact me.

Thank you for your time and consideration.

Respectfully,

Emani Brown

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- William Wayne Justice Center, *Public Service Scholar*
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- Gender Violence Law Caucus, *Co-founder*
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- National Association of Women Judges, Access to Justice Scholarship Recipient

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EXPERIENCE

ACLU of Texas, Houston, TX
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Volunteer Legal Services, Austin, TX
Scott Ozmun Fellow**,** August 2022-May 2023
Responsible for conducting applicant intakes and placing cases with pro bono attorneys.

Texas RioGrande Legal Aid, Austin, TX
Law Clerk in Family Law/Domestic Violence Team, May 2022-August 2022
Drafted documents for clients; assisted with trial prep; conducted legal research.

Full Circle Strategies Consulting Agency, Houston, TX
Research Analyst Intern**,** June 2020-August 2020
Engaged in strategy, research, and program development concerning anti-racism, diversity, equity, and inclusion.

Center of Study of Women, Gender, and Sexuality, *Rice University,* Houston, TX
Seminar and Practicum in Engaged Research**,** September 2019-May 2020
Collaborated with the Tahirih Justice Center in Houston and researched issues of gender, violence, and immigration; presented "Documenting Fears Among Latinx Immigrant Survivors of Gender-Based Violence."

Texas Criminal Justice Coalition, Houston, TX
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Conducted policy research regarding bail/pretrial practices and ways to reduce mass incarceration in Texas.

Origins of Social Cognition Lab, *Yale University,* New Haven, CT
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Dr. James Schutte*, Forensic Psychologist*, El Paso, TX
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Prepared on June 2, 2023

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

UNOFFICIAL TRANSCRIPT PRINTED BY STUDENT

PROGRAM: Juris Doctor

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FAL 2021	427	TORTS		4.0	B	WEW
	332R	LEGAL ANALYSIS AND COMM		3.0	B+	LRM
	531	PROPERTY		5.0	B	MFS
	423	CRIMINAL LAW I		4.0	B	GBS
SPR 2022	421	CONTRACTS		4.0	B+	OB
	232S	PERSUASIVE WRTG AND ADV		2.0	B+	SJP
	433	CIVIL PROCEDURE		4.0	C+	AMD
	434	CONSTITUTIONAL LAW I		4.0	B	WEF
FAL 2022	483	EVIDENCE		4.0	B+	GBS
	383C	CRIMINAL PROCDR: BAIL T		3.0	A-	JEL
	385	PROFESSIONAL RESPONSIBI		3.0	B+	LDW
	387D	ADVOCACY SURVEY		3.0	B+	DMG
	187E	ADVOCACY SURVEY: SKILLS	P/F	1.0	CR	MFB
SPR 2023	389C	FAMILY LAW		3.0	A-	SHW
	697C	CLINIC: CIVIL RIGHTS	P/F	6.0	CR	LSD
	396W	STATUTORY INTERPRETATIO		3.0	B	BAP
	397S	SMNR: RACE PERSPCT FUTU		3.0	A	LNM

	HOURS ATTEMPT	HOURS PASSED	EXCLUDE P/F	SEM AVG
FAL 2021	16.0	16.0	16.0	3.06
SPR 2022	30.0	30.0	30.0	2.93
FAL 2022	44.0	44.0	43.0	3.39
SPR 2023	59.0	59.0	52.0	3.57

UNOFFICIAL TRANSCRIPT UT SCHOOL OF LAW

06-02-2023

EXPLANATION OF TRANSCRIPT CODES

GRADING SYSTEM

LETTER GRADE	GRADE POINTS
A+	4.3
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
D	1.7
F	1.3

Effective Fall 2003, the School of Law adopted new grading rules to include a required mean of 3.25-3.35 for all courses other than writing seminars.

Symbols:

Q	Dropped course officially without penalty.
CR	Credit
W	Withdrew officially from The University
X	Incomplete
I	Permanent Incomplete
#	Course taken on pass/fail basis
+	Course offered only on a pass/fail basis
*	First semester of a two semester course

A student must receive a final grade of at least a D to receive credit for the course. To graduate, a student must have a cumulative grade point average of at least 1.90.

COURSE NUMBERING SYSTEM

Courses are designated by three digit numbers. The key to the credit value of a course is the first digit.

101	-	199	One semester hour
201	-	299	Two semester hours
301	-	399	Three semester hours
401	-	499	Four semester hours
501	-	599	Five semester hours
601	-	699	Six semester hours

SCHOLASTIC PROBATION CODES

SP	=	Scholastic probation
CSP	=	Continued on scholastic probation
OSP	=	Off scholastic probation
DFF	=	Dropped for failure
RE	=	Reinstated
EX	=	Expelled

June 08, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am delighted to write in support of Emani Brown's clerkship application. I had the good fortune to meet Emani through a mentorship program at the University of Texas School of Law and I knew immediately that she is suited for this profession and will serve it honorably. We connected immediately as we are both Texas border natives, and first-generation and as the only lawyer/aspiring lawyer in our families. I directly supervised Emani's work as a summer intern, and we have stayed in close contact throughout her law school career. Based on my observations of her work and her character, I have no doubt that she would be an outstanding clerk.

At the time of her internship, I managed the Domestic Violence and Family Law Team at Texas RioGrande Legal Aid, Inc. (TRLA), which is the second-largest legal aid organization in the United States. The family law team is one of the largest litigation groups at TRLA and our mission is to represent indigent survivors of violence. In my sixteen years at TRLA, I have had many opportunities to work with and supervise young lawyers and law students. The work is challenging, both professionally and emotionally, and many talented people are not suited to the pace and unique trials of working at the intersection of crisis and poverty.

Emani distinguished herself as motivated and highly capable. I discovered quickly that she could handle a wide range of assignments as fast as we could give them to her and produce quality work without micromanagement. As a result, Emani was quickly assigned high-level assignments, such as drafting pleadings and correspondence, responding to discovery, and researching complex legal questions. Notably, Emani performed extensive, time-sensitive research on a case involving complex issues and The Hague Convention prior to a TRLA manager's oral argument before the Fifth Circuit (and was able to observe her research being used on the livestream).

Emani is a rare student and possesses skills and innate wisdom that set her apart from others. For example, Emani has excellent oral and written communication skills. She is also bilingual in English and Spanish, a capability which appears to be in short supply among lawyers, even in Texas. Of critical importance, her demeanor is professional and kind, and as a result, we entrusted her with interacting directly with clients. Emani develops trust and connections with ease, and I observed her generous mentorship of another TRLA intern, a first-generation college student with law school aspirations. I think Emani would never forget that an important part of working for the future is holding out a hand to those who come behind you.

In addition to doing great work, Emani is a pleasure to have on a team and was well-liked by all of her colleagues, including peers, attorneys, and support staff. Because of her initiative in seeking out real-life work opportunities involving research, litigation, self-representation clinics, and working a public interest internship during the school year, Emani would begin her clerkship with a unique breadth of experience. I most admire attorneys who can balance a strong work ethic with a commitment to public service, and I am confident that Emani would represent you well.

If given the opportunity to work with you, I know that Emani would succeed, and it is my pleasure to recommend her to you. I look forward to her very bright future and I am encouraged to know that the next generation of lawyers has her in it.

Warm Regards,

Jacquelyn V. Davis, Esq.
Deputy Civil Director

Jacquelyn Davis - Jdavis@trla.org

June 08, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am pleased to write in support of Emani Brown's application for a clerkship in your chambers. Emani was a student in my Legal Analysis and Communication class, our first-year legal-writing course. In this course, students prepare a series of written assignments, including two full legal memoranda using their own research along with preliminary problems using a packet of authorities.

Emani is a shining star. Many things stand out about Emani, in addition to her legal research and writing skills. She has an inimitable warmth and personable presence in every situation. It is a joy to be around her. She brings her best to every situation. She is intellectually curious, hard-working, and dedicated to improving her already-excellent skills. Rarely have I encountered a student so determined to develop her professional skills. She took advantage of every opportunity to do better with each assignment, and she consistently did so. She has a can-do attitude and is not afraid to ask appropriate questions to deliver the highest-quality work product.

Emani would be a wonderful asset in any chambers, especially one that involves interaction with practicing attorneys. If you interview Emani, you will notice her sunny disposition. What's wonderful is that she is also mature, firm, and steady. I think she would be able to manage with ease interactions some new graduates find difficult.

Over my nearly 30-year career, which has included clerking, practicing law, and teaching, Emani stands out as a student and young lawyer whose career I will eagerly watch. I expect her to do great things.

I hope you will give Emani's application serious consideration.

Sincerely,

Lori R. Mason
Lecturer, The David J. Beck Center for Legal Research, Writing, and Appellate Advocacy
The University of Texas School of Law

June 08, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I write in support of Emani Brown's application for a clerkship in your chambers. I am the Interim Director and Visiting Professor for the Civil Rights Clinic at the University of Texas School of Law. During the course of Emani's involvement in the Clinic, I had the opportunity to supervise and evaluate her legal research and writing, collaboration with classmates and clients, as well as her legal strategizing, and oral advocacy. Having worked closely with her for the semester, I am honored to recommend her for a judicial clerkship position.

In the Clinic, Emani worked on a case involving the death of a man in a private immigration detention center. Though the litigation was at a slow point procedurally, our partner organization took the procedural lull as an opportunity to assign a myriad of research assignments as a way to get ahead of some of our future work. Week after week, Emani took on new and varied research assignments in preparation for mediation, possible settlement, or summary judgment. Our co-counsel wanted to fit in as many research assignments as possible so Emani was on a tight deadline for each assignment. She easily met every deadline and her research and writing were both excellent. Despite all the assignments, it even seemed like she was having fun! Emani was very skilled at understanding the question presented and identifying the best cases to address the question. For example, Emani presented very well-organized research on whether the affirmative defenses that had been raised by the defendant would likely be successful in our case. Though our co-counsel had already begun research on this assignment, Emani found a case that was exactly on point for the issue that our co-counsel had overlooked. She was also a very clear oral communicator. In addition to the drafted written memos on the research she conducted, she also presented them to our co-counsel in weekly Zoom meetings. Emani was effective at explaining her research and answering the questions our co-counsel had about the facts and court's reasoning.

Emani also worked on a policy research project involving worker safety and economic development tax incentives. This project required an entirely different skill set. She had no previous knowledge of this area of law or policy, but she dove right in and spent the semester researching how municipalities can ensure worker safety through their tax incentive contracts. The project required creativity, both in developing solutions, but also in making appropriate contacts. With very little guidance, she and her partner put together two comprehensive and well-written memos on the topic. This required they meet with experts in the field and research how municipalities in other states have been successful in protecting worker safety through tax incentives. It also required that they learn the mechanisms within Texas law to enforce such contractual worker safety issues. The two memos covered a large scope, but Emani's writing was cogent and concise. Despite the wide-ranging topics covered, Emani broke down the pieces to allow the reader to easily follow the proposed solutions and the possible barriers to the solutions. Throughout, it was a pleasure to watch Emani collaborate with her teammate. It was evident Emani was an ideal partner as she was always organized, generous, and positive.

Emani was one of the most consistently prepared and engaged students in the seminar component of the Clinic. The seminar is a twice-weekly seminar on civil rights law, in which I lecture on both civil rights laws and cases and claims and litigation procedure and skills. We incorporate broader issues into the discussion, such as professional identity, the complexities of the judicial landscape, inequity of access to the judicial system, and developing client relationships. In the Clinic seminar, Emani easily digested difficult material and demonstrated her engagement with complex legal issues, both substantive and procedural. She was an active participant in class and had a sophisticated understanding of constitutional law. I also appreciated how respectful Emani was of her classmates in the seminar. She carefully listened to other students and offered direct responses to their discussions.

Emani has shown herself to be a committed legal mind, but what stands out the most about her is her clear and warm communication style. She is both prepared and genuine. Throughout the semester, she asked important questions aimed at solving the problems in the legal system and demonstrated a deep understanding of how the legal system relates to the rest of our society. I admired Emani for the way she treated her classmates and the generosity she brought to her work. She worked with humility and care and the legal field needs more lawyers like her. The legal profession will be better because she will be in it and I am proud to count myself as one of her colleagues.

If you have any questions or need any additional information, please call me at (512) 699-1845 or lia.davis@law.utexas.edu. I'd be happy to talk more about Emani's qualifications.

Sincerely,

Lia Sifuentes Davis
Visiting Clinical Professor of Law and
Interim Director of the Civil Rights Clinic
The University of Texas School of Law

Ms. Lawryn Emani Brown
4600 Mueller Blvd, Austin, TX 78723 | 915-926-9087 | emani.brown@utexas.edu

WRITING SAMPLE

This writing sample is a memorandum I wrote as a student attorney in the Civil Rights Clinic. I was granted permission to use this memo as a writing sample by the co-counsel for whom this research was done. All sensitive and identifying information has been redacted from the work or changed to pseudonyms in order to maintain client confidentiality.

MEMORANDUM

From: Emani Brown

To: Non-Profit Organization

Date: May 6, 2023

Re: Responding to Affirmative Defenses in a Wrongful Death Suit

QUESTION PRESENTED

1. Can an Immigration Detention Center ("IDC") successfully assert, under Section 93 of the Texas Civil Practice & Remedies Code, the affirmative defense of suicide, or invoke the common law unlawful acts doctrine against a survivorship action when the defendant allegedly breached their duty of care, and the act of suicide was foreseeable?
2. Under Section 33 of the Texas Civil Practice & Remedies Code, can an IDC successfully assert an affirmative defense of proportionate responsibility against a survivorship action to bar recovery when the alleged negligence occurred while Mr. Jones was under the sole care and supervision of the IDC staff?

BRIEF ANSWER

1. Likely not. IDC owed a legal duty of care to Mr. Jones, and the exclusive act of Mr. Jones committing suicide is insufficient on its own to render him liable for his death. The Texas Supreme Court understood the legislative shift to a proportionate responsibility scheme as an indication of an intent to reduce recovery, rather than completely bar it, and held that the unlawful acts doctrine was therefore not a viable defense. *Dugger v. Arredondo*, 408 S.W.3d 825, 830-32 (Tex. 2013). Furthermore, to attribute causation for breach of a mental health standard of care to Mr. Jones, whose undiagnosed mental impairment was the very cause of the injury, would be "clearly contrary" to legislative intent. *See RioGrande Regional*

Hospital v. Villareal, 392 S.W.3d 594, 623 (Tex. App. — Corpus Christi 2010). Mr. Jones was struggling with his mental wellbeing while at IDC, and IDC violated an applicable standard of care by not responding to it. IDC is liable, not Mr. Jones. Therefore, a court is unlikely to find merit in an invocation of the suicide defense or the unlawful acts doctrine.

2. Likely not. IDC owed a legal duty of care to Mr. Jones, and the exclusive act of Mr. Jones committing suicide cannot serve to bar recovery. Under Chapter 33, a claimant is only completely barred from recovering damages if their percentage is greater than fifty percent. Tex. Civ. Prac. & Rem. Code Ann. § 33.001. The theory of this case is that Mr. Jones' action of committing suicide was not "the sole cause of the damages sustained," but rather that his death flowed from IDC's negligence. See Tex. Civ. Prac. & Rem. Code Ann. § 93.001(a)(2). Where a plaintiff didn't take any actions apart from the act of committing suicide that violated an applicable standard of care, there is no proportionate responsibility. *RioGrande Regional Hospital v. Villareal*, 392 S.W.3d 594, 624 (Tex. App. — Corpus Christi 2010). IDC violated an applicable standard of care; Mr. Jones did not. Furthermore, Texas courts have understood the proportionate responsibility statute to trump the common law unlawful acts doctrine and as circumventing the suicide defense. *See Dugger*, 408 S.W.3d at 832; *RioGrande Regional Hospital*, 329 S.W.3d at 623. Thus, IDC is unlikely to be successful in asserting the proportionate responsibility defense to bar recovery.

STATEMENT OF FACTS

[OMITTED]

DISCUSSION

I. IDC is unlikely to be successful in asserting the unlawful acts doctrine or the affirmative defense of suicide since Mr. Jones did not take any action that violated an applicable standard of care, apart from the act of committing suicide.

Texas courts have long understood the proportionate responsibility statute to trump the common law unlawful acts doctrine and as circumventing the suicide defense. *See Dugger*, 408 S.W.3d at 832; *RioGrande Regional Hospital*, 329 S.W.3d at 623. Where both the affirmative defense of suicide and proportionate responsibility are invoked, the affirmative defense of suicide has no merit if the defendant breached an applicable duty of care and caused the suicide in whole or in part. *RioGrande Regional Hospital*, 329 S.W.3d at 624. Where both the common law unlawful acts doctrine and proportionate responsibility defense are asserted, the court has found that the common law unlawful acts doctrine is not a viable defense within the confines of the proportionate responsibility statute. *Dugger*, 408 S.W.3d at 832.

Where there is no evidence that the decedent took any actions that violated an applicable standard of care, apart from the act of committing suicide, there is no proportionate responsibility. *RioGrande Regional Hospital*, 329 S.W.3d at 624. In *RioGrande Regional Hospital*, the court held that it was error for the lower court to submit the decedent's proportionate responsibility defense after the jury had already rejected the appellants' suicide affirmative defense. *Id*. The survivors of a hospital patient who committed suicide while in the hospital's care filed a suit against the hospital asserting medical malpractice and wrongful death. *Id.* at 604. Included in the negligence claims was a claim that the appellants "fail[ed] to properly and timely monitor and/or check" on the decedent. *Id*. The court reasoned that to attribute causation for breach of a mental health standard

of care to the patient whose undiagnosed mental impairment was the very cause of the injury would be "clearly contrary" to §93.001(a)(2)'s intent. *Id*. at 623 (citing *Dowell*, 262 S.W.3d at 337 (O' Neill, J., dissenting)). The court also stated that discussion of the decedent's proportionate responsibility under Section 33.001 circumvents discussion under Section 93.001(a)(2). *Id*. Section 93.001 states that the affirmative defense of suicide may not be asserted if the defendant breaches an applicable duty of care and causes the suicide in whole or in part. *Id*. at 624. If the act or omission (in this case, the suicide) is reasonably foreseeable at the time of the defendant's alleged negligence, it can be considered a "concurring cause as opposed to a superseding or new and independent cause." *Id*. at 617, citing *Columbia Rio Grande Healthcare, L.P. v. Hawley,* 284 S.W.3d 851, 857 (Tex. 2009). The court, in applying Supreme Court precedent, held that the decedent's suicide, "at best, [c]ould be considered a concurrent cause." *Id*. at 619. Based on the reasoning set out by this court, a decedent's suicide will likely not be found to support an assertion of the proportionate responsibility defense.

Furthermore, the Legislature's adoption of the proportionate responsibility scheme is indicative of its intention to apportion responsibility where appropriate, rather than bar recovery completely. *Dugger*, 408 S.W.3d at 827. In *Dugger*, a mother brought a wrongful death action against her son's friend, following her son's death after ingesting heroin. *Dugger*, 408 S.W.3d at 827. She alleged that the friend was negligent in delaying calling emergency services and failing to advise paramedics that her son had ingested heroin. *Id*. The defendant asserted both the proportionate responsibility defense and the unlawful acts doctrine. *See Id*. The Court analyzed how the proportionate responsibility defense and the unlawful acts doctrine coexist. *Id*. The Court stated that the legislative shift to a proportionate responsibility scheme indicated an intent to reduce recovery, rather than completely bar it. *Id*. at 830. Because of this understanding of legislative

intent, the Court concluded that the unlawful acts doctrine was not a viable defense under the confines of the proportionate responsibility statute. *Id*. at 832. The Court accordingly affirmed the judgment of the court of appeals, which reversed the summary judgment for the defendant and remanded the case to the trial court. *Id*. at 836.

Just as in *RioGrande Regional Hospital*, Mr. Jones committed suicide while in the care and under the supervision of the IDC's medical team. *See RioGrande Regional Hospital*, 329 S.W.3d at 624. Additionally, Mr. Jones' act of suicide was also reasonably foreseeable. *Id*. at 617. Upon his arrival to IDC, he told a nurse that he had been threatened by drug traffickers. IDC_00081. About a month later, after his CFI, a case manager at IDC emailed the mental health team to request an evaluation, given the bad news that Mr. Jones had recently received about his asylum case. Jones_00000049. The unnamed case manager noted that Mr. Jones appeared "upset and sad." Jones_00000049. Thus, IDC was aware of how Mr. Jones' negative CFI result affected him emotionally. IDC ignored the accumulation of evidence of Mr. Jones' mental distress and potential suicidality. Prior to Mr. Jones' death, IDC was aware of at least three of the four of the "Suicide Risk Indicators Often Observed" listed on slides in an untitled IDC training on suicidality — namely, that Mr. Jones had recently received bad news from a court hearing; he reported insomnia; and he told the psychologist that he experienced anxiety. IDC_000924. Because of this, a court would likely reason, just as the court did in *RioGrande Regional Hospital*, that to attribute causation for breach of a mental health standard of care to Mr. Jones, whose undiagnosed mental impairment was the very cause of the injury, would be "clearly contrary" to legislative intent. *RioGrande Regional Hospital*, 329 S.W.3d at 623.

Although the facts in *Dugger* are distinguishable from Mr. Jones' case, *Dugger* highlights the way affirmative defenses commonly asserted together in wrongful death cases interact based

on the legislative intent behind the statutes. *Dugger*, 408 S.W.3d at 832. In reaching its holding that the unlawful acts doctrine was not a viable defense under the confines of the proportionate responsibility statute, the Court highlighted some of the legislative intent behind Chapter 33. *Id*. at 327. Therefore, a court will have a clearer understanding of the purpose behind the proportionate responsibility scheme and how to apply Chapter 33 to Mr. Jones' case. *Id*.

II. It is unlikely IDC will be able to successfully assert a proportionate responsibility defense.

IDC will likely be unable to assert the proportionate responsibility defense. The proportionate responsibility statute allows a tort defendant to designate as a responsible third party a person who is alleged to have caused in any way the harm for which the plaintiff seeks damages. Tex. Civ. Prac. & Rem. Code Ann. § 33.001-33.002. Once asserted, the factfinder is to determine the percentage of responsibility for "(1) each claimant; (2) each defendant; (3) each settling person; and (4) each responsible third party who has been designated under § 33.004." Tex. Civ. Prac. & Rem. Code Ann. § 33.003. If a claimant's responsibility exceeds fifty percent, the claimant is barred from recovering any damages. Tex. Civ. Prac. & Rem. Code Ann. § 33.001.

Chapter 33 applies to "any cause of action based on a tort." Tex. Civ. Prac. & Rem. Code Ann. § 33.002. This includes a survivorship action brought in a wrongful death case. *Dugger*, 408 S.W.3d at 831. In a wrongful death case, a "claimant" includes the person who was injured, was harmed, or died or whose property was damaged; and any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person. Tex. Civ. Prac. & Rem. Code Ann. § 33.011. Thus, when the claim involves death, "claimant" includes not only the party seeking damages, but also the decedent. *JCW Electronics, Inc., v. Garza*, 257 S.W.3d 618, 707 (Tex. 2008). Therefore, in this case, IDC

can assert the proportionate responsibility defense against any of the three claimants – Mr. Jones, his father, or his son.

The proportionate responsibility statute, however, "indicates the Legislature's desire to compare responsibility for injuries rather than recovery," even if the claimant was partially at fault or violated some legal standard. *Dugger*, 408 S.W.3d at 832. The Legislature's adoption of the proportionate responsibility scheme in Chapter 33 evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily recognized affirmative defense be apportioned rather than barring recovery completely. *Id*. at 827. As previously mentioned, it is unlikely that the Legislature intended to attribute causation for breach of a mental health standard of care to the patient whose undiagnosed mental impairment was the very cause of the injury. *RioGrande Regional Hospital*, 392 S.W.3d at 623. Suicide is preventable. *Providence Health Center v. Dowell*, 262 S.W.3d 324, 330 (Tex. 2008). Where the decedent plaintiff did not take any actions that violated an applicable standard of care, apart from committing suicide, there is no proportionate responsibility. *RioGrande Regional Hospital*, 329 S.W.3d at 624. In asserting the proportionate responsibility affirmative defense, IDC has the burden of pleading and proving the elements. *See Id*. at 621.

There is sufficient evidence suggesting IDC's negligence in monitoring and properly responding to Mr. Jones' deteriorated mental health while at IDC. The Supreme Court of Texas has specifically held that suicide is preventable. *Providence Health Center*, 262 S.W.3d at 330. In *Providence Health Center*, parents of a patient who committed suicide following the discharge from emergency room where had been treated a failed suicide attempt, brought a wrongful death and a survivorship action against the defendants. *Id*. at 327-28. While the patient was in the hospital, the nurses and doctors failed to make a comprehensive assessment of his risk of suicide.

Id. at 326. Even though the Supreme Court of Texas ultimately held that there was no evidence that the defendants caused the suicide, it recognized that suicide is preventable and that had the decedent had stayed with his family as instructed, he would not have hanged himself when he did. *Id*. at 330.

In *JCW Electronics*, the Court held that a party who seeks damages for death or personal injury under a breach of implied warranty claim is subject to Chapter 33's proportionate responsibility scheme. *JCW Electronics*, 257 S.W.3d at 703. The decedent was arrested for public intoxication and placed in jail. *Id*. at 702. The following day, he made a phone call to his mom to arrange his bail. *Id*. On the day he was supposed to be released, he was found dead in his cell, hanging from the telephone cord provided by JCW Electronics. *Id*. His mom sued the city for his death and joined JCW as a defendant. *Id*. At trial, the jury attributed sixty percent of the liability to the decedent. *Id*. at 703. Although the decedent's mom argued that Chapter 33 should not apply to breach of implied warranty claims, the Court stated that these claims have been "historically included" when comparing fault in tort-based litigation. *Id*. at 707. Because the jury found the decedent sixty percent responsible for his death, for reasons not given in the case, his contributory negligence barred recovery. *Id*. The Court rendered judgment that claimants take nothing. *Id*. at 708.

Mr. Jones, like the patient in *Providence Health Center*, was under the care of staff who failed to make a comprehensive assessment risk of suicide. *Providence Health Center*, 262 S.W.3d at 326. Mr. Jones' suicide, however, happened while under the direct supervision of IDC employees, not thirty-three hours after being released by a health care provider. *See Id*. Mr. Jones' act of committing suicide was not "the sole case of the damages sustained," but rather his death followed IDC's negligence. See Tex. Civ. Prac. & Rem. Code Ann. § 93.001(a)(2). Based on both

Section 33.001, the interpretation of Section 93.001 under 33.001, and the above case law, there exist sufficient facts and evidence to show that the affirmative defense of proportionate responsibility fails in this case.

Even though in *JCW Electronics*, the inmate's contributory negligence precluded recovery, there is no reason provided as to how fault was allocated. *See JCW Electronics*, 257 S.W.3d at 618. There is nothing indicating that the decedent's proportionate liability was due solely to the fact of suicide. *Id*. This missing information taken with the highly distinguishable facts of Mr. Jones' case, limits the persuasiveness of *JCW Electronics*.

Because there is no evidence that Mr. Jones' son or father played any part in Mr. Jones' death, the issue of proportionate responsibility is unlikely to extend to them in any way. Additionally, the court will likely find that Mr. Jones did not violate an applicable standard of care and is thus not proportionally liable for his suicide. While IDC has not conceded that they owed a heightened duty of care to Mr. Jones as the entity that detained him and had control over his mental health care needs, there is, in our possession, sufficient facts and evidence to show this. This case alleges, and discovery has helped establish, numerous facts that demonstrate how IDC's negligence led to Mr. Jones' death. There is nothing in our possession to support the notion that Mr. Jones is proportionally responsible.

CONCLUSION

IDC will likely be unable to successfully assert the suicide defense or the unlawful acts doctrine to shift liability to Mr. Jones and will likely be unable to assert the proportionate responsibility defense to preclude recovery. The theory of this case is that Mr. Jones' action of committing suicide was not "the sole cause of the damages sustained," but rather that his death flowed from IDC's negligence. See Tex. Civ. Prac. & Rem. Code Ann. § 93.001(a)(2). Based on

the facts of the case, documents in our possession, statutory interpretation, and the above case law, it seems unlikely than any fact finder would find Mr. Jones' liable for his own suicide or more than fifty percent responsible for his death. Thus, IDC will likely be unable to convince a factfinder that their affirmative defenses have any merit.

Applicant Details

First Name	**Kelsey**
Middle Initial	**M**
Last Name	**Brown**
Citizenship Status	**U. S. Citizen**
Email Address	**kmb9591@nyu.edu**
Address	**Address** Street **119 Prospect Park W** City **Brooklyn** State/Territory **New York** Zip **11215** Country **United States**
Contact Phone Number	**4046986318**

Applicant Education

BA/BS From	**Vanderbilt University**
Date of BA/BS	**May 2021**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Arons, Anna
anna.arons@nyu.edu;aronsa@stjohns.edu
530-574-6790

Gottlieb, Christine
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212-998-6693

Murray, Melissa
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(212) 998-6440

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue,
3Rd Floor Albany, GA 31701-2566

Dear Judge Gardner:

My name is Kelsey Brown, and I am a rising third-year law student at New York University School of Law, where I am an Online Editor for the *NYU Law Review*. At the encouragement of Professor Melissa Murray, I am writing to apply for the 2024-2026 clerkship in your chambers, with a preference for a one-year term. As an Atlanta native, I have always planned on returning to Georgia to continue the city's rich legacy of Black leaders using the law to advance our community's civil rights. Having the opportunity to begin my legal career in Albany, where generations of my family have lived, would be a testament to my ancestors' resilience.

During law school, I have been proactive in gaining skills that make me confident that I would meaningfully contribute to your chambers. My experiences touch a range of civil rights issues, reflecting my passion for using the law creatively to address systemic injustice. Prior to law school, I worked in reproductive and gender justice community education at the Margaret Cuninggim Women's Center at my university and in voting rights advocacy in the South at Fair Fight Action. During my 1L summer, I interned at the American Civil Liberties Union Reproductive Freedom Project. There, I provided research support for their Georgia team as they filed a state constitutional challenge to Georgia's abortion ban and continued their federal litigation against Georgia's fetal personhood amendment. As such, I strengthened my ability to synthesize caselaw so that my supervising attorneys could make strategic litigation decisions. In the NYU Family Defense Clinic during my 2L year, I represented two parents accused of neglect in their family court proceedings. I filed numerous motions on their behalf, sharpening my ability to write in a succinct manner that effectively advocated for their needs. As a result of my team's efforts, my client's two children safely returned home after years in foster care. I am currently interning at Planned Parenthood Federation of America, where I am working on pivotal constitutional law cases in state court. On account of these experiences, I have developed a firm grounding in legal research and fine-tuned my ability to use case law to answer nuanced legal questions.

My resume, unofficial law transcript, and writing sample, which I prepared in my legal writing class, are submitted with this letter. I have also included recommendations from Professor Murray, who I worked for as a research assistant, Professor Christine Gottlieb, my Family Defense supervisor, and Professor Anna Arons, who I work closely with for the Parent Legislative Action Network. They can be contacted at the following:

Professor Melissa Murray: melissa.murray@nyu.edu; 212-998-6440
Professor Christine Gottlieb: gottlieb@mercury.law.nyu.edu; 718-374-1364
Professor Anna Arons: aronsa@stjohns.edu; 530-574-6790

As a Black woman dedicated to public service, I would be especially honored to clerk in your chambers. Thank you for your consideration.

Respectfully,

/s/ Kelsey Brown
Kelsey Brown

KELSEY BROWN

kmb9591@nyu.edu
404-698-6318

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Honors: Root Tilden Kern Jacobson Scholar for Women, Children, and Families
NYU Law Review, Online Editor
NYU Clerkship Diversity Program
Activities: Research Assistant for Professor Melissa Murray
If/When/How Lawyering for Reproductive Justice, 2022-23 Co-President
Black Allied Law Students Association, Member
OUTLaw, Member

VANDERBILT UNIVERSITY, Nashville, TN
BA in Political Science and Sociology, *magna cum laude*, May 2021
Culminative GPA: 3.927
Honors: Chancellor Scholar

EXPERIENCE

PLANNED PARENTHOOD FEDERATION OF AMERICA, New York, NY
Public Policy Litigation & Law Legal Intern, May 2023 - July 2023
Wrote memoranda on legal issues arising in state abortion challenges. Directly supported the Montana litigation team on constitutional challenges to statutes limiting Medicaid coverage of medically necessary abortions.

BROOKLYN DEFENDER SERVICES, Brooklyn, NY
NYU Family Defense Clinical Student Advocate, August 2022 - May 2023
Represented two clients whose children were removed from their care in Family Court. Researched connections between reproductive rights and the family regulation system for Parent Legislative Action Network.

AMERICAN CIVIL LIBERTIES UNION, New York, NY
Reproductive Freedom Project Legal Intern, June 2022 - August 2022
Wrote memoranda on constitutional rights and civil procedure. Participated in Georgia litigation team meetings and client advisement meetings. Provided research support for state constitutional challenge to Georgia's abortion ban.

FAIR FIGHT ACTION, Atlanta, GA
Voter Protection Fellow, April 2021 - October 2021
Documented voter's experiences at the polls to ensure their voices were included in litigation and advocacy strategies. Onboarded declaration volunteers and facilitated trainings. Researched voter suppression in the South.

AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, Atlanta, GA
Reproductive Rights and Justice Intern, May 2020 - April 2021
Created Reproductive Justice Learning Hours, a bi-monthly political education group. Developed a comprehensive syllabus of articles addressing Reproductive Justice. Attended hearings on Georgia's abortion ban and Medicaid.

DEKALB COUNTY SOLICITOR-GENERAL'S OFFICE, Atlanta, GA
Communications Intern, May 2019 - July 2019
Shadowed prosecutors in misdemeanor court hearings. Managed official Solicitor General Twitter and Facebook. Developed stakeholder and donor lists. Curated sponsorship letters for community engagement events.

ADDITIONAL INFORMATION

Created a Reproductive Justice Blog that offered pamphlets about Reproductive Justice issues which can be viewed at: reproductivejusticetoolkit.wordpress.com (materials last updated in 2021). NYU Pro-Bono Scholar 2024.

Name: **Kelsey M Brown**
Print Date: **06/01/2023**
Student ID: **N16286575**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Faraz Sanei			
Criminal Law		LAW-LW 11147	4.0	B+
Instructor:	Anna N Roberts			
Torts		LAW-LW 11275	4.0	B+
Instructor:	Daniel Jacob Hemel			
Procedure		LAW-LW 11650	5.0	B
Instructor:	Troy A McKenzie			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	Sarah E Burns			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law		LAW-LW 10598	4.0	A-
Instructor:	Melissa E Murray			
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Faraz Sanei			
Legislation and the Regulatory State		LAW-LW 10925	4.0	B+
Instructor:	Samuel J Rascoff			
Contracts		LAW-LW 11672	4.0	B
Instructor:	Clayton P Gillette			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	Sarah E Burns			

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Family Defense Clinic Seminar		LAW-LW 10251	4.0	A
Instructor:	Christine E Gottlieb Nila Amanda Natarajan			
Family Defense Clinic		LAW-LW 11540	3.0	A
Instructor:	Christine E Gottlieb Nila Amanda Natarajan			
Evidence		LAW-LW 11607	4.0	B+
Instructor:	Daniel J Capra			
Research Assistant		LAW-LW 12589	1.0	CR
Instructor:	Melissa E Murray			
Reproductive Rights and Justice: A Comparative Perspective Seminar		LAW-LW 12768	2.0	A
Instructor:	Chao-ju Chen			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Family Defense Clinic Seminar		LAW-LW 10251	4.0	A-
Instructor:	Christine E Gottlieb Nila Amanda Natarajan			
Employment Law		LAW-LW 10259	4.0	B+
Instructor:	Cynthia L Estlund			
Professional Responsibility and the Regulation of Lawyers		LAW-LW 11479	2.0	A
Instructor:	Trisha Michelle Rich			
Family Defense Clinic		LAW-LW 11540	3.0	A
Instructor:	Christine E Gottlieb Nila Amanda Natarajan			
Research Assistant		LAW-LW 12589	1.0	CR
Instructor:	Melissa E Murray			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	58.0	58.0

End of School of Law Record

Unofficial

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

NYU LAW

ANNA ARONS
Acting Assistant Professor
Lawyering Program

Impact Project Director
Family Defense Clinic

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May 31, 2023

RE: Kelsey Brown, NYU Law '24

Your Honor:

I write to recommend Kelsey Brown for a clerkship in your chambers. I have worked closely with Kelsey over the last year in my capacity as the Impact Project Director of NYU's Family Defense Clinic, as I supervised her on a project working with a coalition that seeks legislative change. Through this experience, I know Kelsey to be a curious and critical thinker, a deft researcher and clear writer, and diligent and self-motivated in all that she does. I am confident that she would bring these same outstanding qualities to a clerkship and I recommend her without reservation.

The NYU Family Defense Clinic represents parents facing child welfare cases, striving to protect and expand the due process rights of families and to advocate for services to which families are entitled. Centering the reality that the overwhelming majority of families affected by the child welfare system in New York City are poor and Black or Latinx, the Clinic works through both direct representation and systemic advocacy to combat the indignity and inequality routinely experienced by parents involved with the child welfare system. All clinic students represent individual clients in direct-representation cases in family court, itself a time- and emotionally-intensive undertaking. In addition to this work, students may also volunteer for additional projects, such as working with faculty and community activists on projects designed to transform child welfare policy and practice on a systemic level. In all of this work, the Clinic seeks to empower students to take the lead in all aspects of their casework.

In Fall 2022, Kelsey volunteered for an additional project, on top of her casework. The project entailed working with members of the Parent Legislative Action Network ("PLAN")—a coalition committed to ending the harms of the child welfare system and transforming the way society supports families—to study the relationship between reproductive justice and the child welfare system, with an eye toward writing a report to highlight the ways in which limits of reproductive choice are closely connected to the government's regulation of poor families and Black and Latinx families through the child welfare system. I supervised Kelsey's work on this project from Fall 2022 to Spring 2023. For the duration of the fall semester and throughout the spring semester, I met with Kelsey for individual supervision on a monthly basis and for substantive meetings with other PLAN members on a biweekly basis. Thus, I was lucky to have an extensive view into Kelsey's outstanding work.

Kelsey's work on this project has required flexibility, initiative, and an ability to navigate working within a group run by consensus. Kelsey joined a working group of approximately five members of PLAN, all of whom have different personal and professional backgrounds. The PLAN members had already begun conceptualizing this project but it was still in nebulous form. Kelsey jumped in immediately and enthusiastically. From her first meeting with the PLAN members, Kelsey found a good balance between sharing her own ideas and leaving space for others to speak up as well, and volunteering to take on new tasks but not taking over. Over the course of the year, Kelsey has done factual research into the number of abortions reported in states across the country, tracked access to abortions in those states, and surveyed media accounts of the relationship between abortion access and foster care and child welfare more broadly. Beyond deftly researching these topics, she has consistently presented clear and concise summaries, pulling relevant points out of the sea of information and succinctly summarizing key recurring narratives.

Kelsey's contributions, drawing on her considerable background in reproductive-justice work and the many connections she saw this year between that work and her work in the Family Defense Clinic, pushed the group to move the project in a new direction, from a quantitative out-of-state project to a qualitative in-state project. That the group built consensus around this idea speaks to the thoroughness of Kelsey's research, her ability to cogently present her vision for this project, and her excitement over sharing it with the group. Kelsey's curiosity and critical thinking skills were likewise on display in our individual supervision meetings, where she regularly moved beyond surface-level understanding or rote acceptance of "norms" to raise pressing questions about lawyers' roles as advocates in our legal system—and outside it.

As I hope is clear through all of this, Kelsey was a delight to supervise—or perhaps more accurately, to work alongside. She is enthusiastic, conscientious, and kind, not to mention fully dedicated to all that she takes on. Even when juggling extra responsibilities and stressors in and out of law school, Kelsey maintained a sense of perspective and balance, not to mention a quick laugh. I have no doubt that Kelsey would bring this same thoughtful, good-humored approach to her clerkship and that she would make the term a genuine pleasure.

If you have any questions or would like any additional information, I am more than happy to talk further. I can be reached on my cell phone at 530-574-6790 or, until July 1, by email at anna.arons@nyu.edu. Following that date, I will be joining the faculty at St. John's University School of Law, but I remain available to provide additional information and can be reached then at aronsa@stjohns.edu.

Sincerely,

Anna Arons

June 05, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I write to enthusiastically recommend Kelsey Brown for a judicial clerkship.

Kelsey was a student in the Family Defense Clinic, which I teach at NYU. The clinic is a year-long, 14-credit course, which has both seminar and fieldwork components. Students handle all aspects of representing parents in civil child abuse and neglect proceedings. I got to know Kelsey quite well because in addition to twice weekly seminar meetings, I met with her at least once a week outside of class to supervise her work on cases.

Kelsey has all the makings of a top-notch attorney: she is smart, dedicated, and has impressive analytic and interpersonal skills. Her contributions to our seminar discussions were consistently valuable and her field work on cases was excellent. Kelsey is clearly committed to social justice, as are many of the law students I am lucky to teach. What made Kelsey stand out was her ability to transform her outrage over injustice into effective advocacy, including when she was working under pressure.

I recall in particular that Kelsey and her partner drafted a very strong set of written applications to submit to the Brooklyn Family Court following a hearing they litigated on behalf of one client, a single mother of two boys with special needs. Kelsey parsed through an extensive record to build a strong narrative that balanced tricky factual complications and made a convincing legal argument on an issue on which there was not much direct precedent. Her advocacy resulted in the Court making a finding that the foster care agency had failed to make the social service efforts it was required by law to make for our client's family—in my experience, though often merited, such judicial findings are quite rare in New York City Family Courts.

Kelsey worked with a different partner to draft a motion in another case that similarly required nuanced argument. She did a very strong job drawing on statutes and case law to convincingly argue that the Family Court had the authority to order that our client's children be moved to a new foster home and that a move would serve the children's best interests by increasing the chances of family reunification.

My aspiration is that students will do all the speaking on behalf of the clinic's clients at court appearances (with me observing rather than participating) and Kelsey rose to that challenge. She has a poise in the courtroom that serves her extremely well. She is able to modulate an impressive tenacity with realistic expectations and insight into how to effectively persuade others to her position. I recall a court appearance at which a judge unfairly scolded Kelsey for not having handled something that was actually the responsibility of one of the opposing parties. It would have been a tough moment for any attorney and Kelsey handled it with unusual composure, effectively re-directing the judge back to the issue at hand in a way that served the client.

I also saw Kelsey successfully handle tough situations outside the courtroom. She had one client whose deteriorating mental health presented particular challenges. Kelsey was patient and compassionate with the client, providing meaningful support and legal counsel even when the client was extremely tense.

In our seminar, Kelsey's comments always raised the level of the conversation. She was able to constructively push her colleagues to see controversial issues from new angles. I was particularly impressed with the ways she was able to connect the knowledge of reproductive justice issues that she brought into the course with the family regulation issues we were discussing—these are important connections that not enough advocates draw.

Additionally, Kelsey volunteered to do work beyond the requirements of the course. Toward the end of the first semester, I offered her the opportunity to take on a new case, making clear that given the timing (with exams approaching), I did not expect her to accept that offer—she nonetheless jumped right into the new assignment. Later in the year, she again went above and beyond expectations to volunteer to work on a policy project with a community-based coalition.

Throughout her time in the clinic, Kelsey demonstrated the abilities to work independently, seek supervision when appropriate, and effectively incorporate feedback.

On a more personal note, it is a delight to work with Kelsey. Having clerked myself, for the Honorable Fortunato P. Benavides, in the U.S. Court of Appeals for the Fifth Circuit, I have a sense of the importance of positive working relationships in judicial chambers. Kelsey's intelligence, active engagement, and passion for social justice were combined with an easygoing manner that made it a pleasure to work with her. I regularly saw her boost the morale of her student colleagues when they were under pressure or were grappling with the emotionally taxing aspects of our cases. And I've heard from more than one student in the class behind her that Kelsey has provided them useful advice as they make their way in the law school experience.

In short, I have no doubt that Kelsey will be a leader in whatever area of law she chooses to pursue and I am confident Kelsey would make a wonderful judicial clerk.

I would be happy to provide additional information if that would be helpful. I may be reached on my cell phone at 718-374-1364.

Christine Gottlieb - gottlieb@mercury.law.nyu.edu - 212-998-6693

Sincerely,

Christine Gottlieb

Christine Gottlieb - gottlieb@mercury.law.nyu.edu - 212-998-6693

NYU | LAW

MELISSA MURRAY
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Professor of Law

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May 27, 2023

Dear Judge:

Kelsey Brown, a rising third-year student at NYU Law, has asked me to write a letter of recommendation in support of her application to be a clerk in your chambers. I am delighted to do so. Over the course of her time at NYU Law, I have gotten to know Kelsey well—as a member of NYU's cohort of Root-Tilden-Kern scholars, as a student in my Constitutional Law class, and as my research assistant. As a former law clerk to two federal judges (Justice Sonia Sotomayor and Judge Stefan R. Underhill), I am confident that she will be a marvelous addition to your chambers.

I first met Kelsey when she enrolled in my Spring 2022 Constitutional Law class. From the start, she distinguished herself with her careful preparation and insightful comments. I was not surprised when she wrote a very strong exam, earning an A- grade in the course. Her academic success in my class is no anomaly. As you will see from her transcripts, she graduated *magna cum laude* from Vanderbilt University with a 3.9 GPA. She has followed that undergraduate success with a very strong academic showing in her first two years at NYU Law.

Based on her strong performance in my class, I invited Kelsey to serve as one of my research assistants in her second year. In that capacity, I had the chance to observe her work habits and research and writing skills up close. Already a strong writer and a diligent student, Kelsey used the experience to further hone her research and writing skills. To be sure, her time working with me was complemented by an internship with Planned Parenthood and work as a staffer and online editor for the *NYU Law Review*. Not only did Kelsey balance these competing obligations well, she used each of these experiences to seek feedback and guidance for improving her writing skills. In just a year, she has become a more confident researcher who writes fluently and well. I was especially impressed with a research memo that she drafted, explaining the ways in which conservative interests have imbricated narratives concerning *Dred Scott*, *Lochner v. New York*, and *Roe v. Wade*. Her research has been invaluable to me as I have worked to launch a new research project on discourses of enslavement.

Kelsey's strong commitment to public service complements her academic successes. She entered NYU as the Root-Tilden Kern Jacobson Scholar for Women, Children, and Families—a tremendous honor that awarded her a full merit scholarship to NYU in recognition of her commitment to public service and her intent to dedicate her legal career to empowering marginalized families. She is already making good on these commitments. At NYU, she has been a standout student in the Family Defense Clinic, where she has represented a parent accused of neglect in family court proceedings. As a result of her clinic work, Kelsey has helped families grappling with some of the most traumatic moments in their lives, while also developing her own professional acumen in motions practice, advocacy, and family law.

Kelsey's commitment to public service runs deep and precedes her tenure at NYU Law. During her time as an undergraduate at Vanderbilt, she was deeply involved in the community surrounding the

university, tutoring refugee students in English and mentoring young Black students at a Nashville elementary school. It was during her time at Vanderbilt that Kelsey began cultivating her interests in intersectional feminism and reproductive justice. As one of the only Black interns in Vanderbilt's Margaret Cunningham Women's Center, Kelsey introduced an intersectional frame into the organization's programming efforts. She organized and led monthly "Kitchen Table Talks" in which students discussed feminism and its intersection with various social justice issues.

While an undergraduate, Kelsey also worked as an intern with the American Civil Liberties Union of Georgia in the organization's Reproductive Rights and Justice group. There, she made her mark in the period following the murder of George Floyd, creating and leading a bi-monthly community education group called "Reproductive Justice Learning Hours." She created a comprehensive syllabus that included materials related to reproductive rights and justice, and every other week, she led community members in discussion, using a reproductive justice framework to highlight how the law may serve as a tool of both reproductive oppression and liberation.

I mention these experiences because they make clear Kelsey's remarkable ability to draw connections between seemingly disparate systems and doctrines. This skill will translate well to a chambers environment in which clerks are routinely called upon to consider the broader implications of seemingly isolated issues and questions.

As with everything that she does, Kelsey has approached her clerkship search with thoughtfulness and care. Raised and educated in the South, she is eager to return to the region to clerk and work. She believes, as I do, that a district court clerkship will be a terrific foundation for her work as a public interest lawyer in the region. Put simply, Kelsey will make the most of this opportunity to serve your chambers and the broader community well.

In sum, I am delighted to recommend Kelsey to you as a judicial clerk. She is a quick learner and manages to find joy and excitement in her work, no matter the assignment. Moreover, she has a warm and lovely personality. She will fit in easily in any work environment. I hope you will give her application close consideration as you make your personnel selections. If I can be of further assistance, please feel free to contact me at melissa.murray@law.nyu.edu or via telephone at (212) 998-6440.

Sincerely Yours,

Melissa Murray
Frederick I. and Grace Stokes Professor of Law
Law clerk to the Hon. Sonia Sotomayor (2003-04)
Law clerk to the Hon. Stefan R. Underhill (2003-02)

KELSEY BROWN

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404-698-6318

WRITING SAMPLE: JUNE 2023

The attached writing sample is a memorandum I prepared in my legal writing class at New York University School of Law in the Fall of 2021. I was asked to research whether our client had a viable claim under Title VII. We were asked to look at case law in the Second Circuit. Please note that this memorandum represents my own work and received minor edits from my professor.

Cravens, Dunlop, & Vakili PLLC
Attorney Work Product
Privileged & Confidential

To: Faraz Sanei
From: Kelsey Brown
Date: October 25, 2021
Re: Title VII Claim for Mrs. Anya Simo

Questions Presented:

1. What initial procedural steps does our client, Anya Simo, need to complete before filing a Title VII claim against her employer, Mr. Casey Bolder?
2. Does Mrs. Simo, a mother who was passed over for a promotion at her workplace, have a sex discrimination claim under Title VII? What is her likelihood of winning at trial?
3. What remedies might Mrs. Simo be entitled to if she wins at trial?

Short Answers:

1. **File a Job Discrimination Complaint with the EEOC.** Before Mrs. Simo can make a federal claim under Title VII, she must file a job discrimination complaint with the Equal Employment Opportunity Commission. *See Filing A Charge of Discrimination*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/filing-charge-discrimination (last visited Nov. 3, 2021). Mrs. Simo's case is also covered by New York state law. As such, she has 300 days to file her complaint after initially contacting the EEOC by phone, email, or via an in-person meeting. *Id.* Mrs. Simo will need to provide detailed information of her workplace experience to the EEOC, including her employer's information and the alleged discriminatory conduct. *Id.* The EEOC will make an initial decision whether her complaint is covered by their laws. *Id.* If they determine that her complaint is covered, Mrs. Simo must complete a

questionnaire and receive counseling from the EEOC. *Id.* At this point, Mrs. Simo must decide if she wants to file a formal "Charge of Discrimination." *Id.* If she decides to move forward, the EEOC will provide a copy of the formal complaint to her workplace within 10 days. *Id.*

2. **Yes, Mrs. Simo has a Title VII claim, but her chances of winning at trial are very low.** While Mrs. Simo does have a sex discrimination claim under Title VII, she does not have a strong likelihood of winning at trial. The Second Circuit uses the *McDonnell Douglas* burden shifting framework, but the ultimate burden of proving discrimination lies with the plaintiff. Mrs. Simo has enough evidence to establish a prima facie case, but she does not have sufficient evidence to prove that her employer's nondiscriminatory reasons were pretext or sex discrimination was a motivating factor. It is likely that this case will resolve at the summary judgment stage, with the court granting summary judgment to the employer. To provide Mrs. Simo with the most advantageous result, we should explore mediation.
3. **Injunctive and Declaratory Relief.** If Mrs. Simo wins at trial under the mixed-motive theory, it is likely that she would only be entitled to injunctive and declaratory relief. Mrs. Simo's likelihood of winning at trial is very low. As such, mediation would better cater to her goals.

Introduction:

This memo proceeds in four parts. Part I provides an overview of the facts of Mrs. Simo's case, outlining the discriminatory conduct of her employer and her goals. Part II provides an overview of relevant case law addressing sex discrimination in the Second Circuit. Part III

outlines the remedies available to Mrs. Simo based on the facts of her case, her goals, and the case law. Part IV briefly concludes.

I. Facts Summary

All of the following information is based on Mrs. Simo's intake meeting conducted on October 14, 2021, documents Mrs. Simo sent to us via email, and a statement taken from Mr. Muller, Mrs. Simo's former boss, from October 15, 2021.

Anya Simo is the mother of two children. Mrs. Simo is married but takes on the majority of the childcare responsibilities in her household. She currently works for Est1883 as an assistant super at Pine Street, an apartment complex in Brooklyn. Est1883 is a LLC based in Connecticut which is owned by Casey Bolder. They employ about 15–20 people throughout their Connecticut headquarters, their Bushwick property, and their Ozone Park property. As an assistant super, Mrs. Simo assists tenants with various maintenance issues and assists the lead super in managing the property. Mrs. Simo has worked at the Pine Street property for seven years with a continuing expectation that she would be promoted to lead super when Mr. Muller, her former boss, retired. Over that time, Mrs. Simo took on more responsibilities, built rapport with the tenants, and built relationships with local vendors.

Mrs. Simo alleges that Mr. Bolder failed to promote her to lead super because she is a mother. Around Labor Day of 2021, Mr. Bolder notified Mrs. Simo that he hired a new super from outside of the organization to replace Mr. Muller. The new super, Mr. Moreland, is also a parent. He only has custody of his children on the weekend and has fewer childcare responsibilities. He does not have prior super experience, but previously worked in construction. Mrs. Simo was not aware that Mr. Bolder was looking for applicants, nor was she given the opportunity to apply. When Mrs. Simo inquired into why Mr. Bolder did not promote her, he

mentioned issues regarding her tardiness and various Environmental Control Board (ECB) violations, including inadequate snow shoving, a blocked alley, and improper recycling.

There were a number of comments Mr. Bolder made that concerned Mrs. Simo. As Mrs. Simo and Mr. Bolder discussed the hire of Mr. Moreland, Mr. Bolder said the lead super position was a "24/7 job." He expressed concern about Mrs. Simo's ability to balance the demands of the job with parenting two children. On another occasion, Mr. Bolder was struggling to get in contact with Mrs. Simo as she was doing work in the building's basement, which has limited cell-phone reception. Once he got in contact with her, Mr. Bolder suggested that Mrs. Simo needed to work on her "work life balance." After Mrs. Simo told Mr. Bolder about her second maternity leave, Mr. Bolder said Mrs. Simo was trying to be a "super-mom" in conversation with Mr. Muller.

Mrs. Simo mentioned that the complex has a "house rules" document. This document notes she is not permitted to provide the master key to any tenants. However, on one occasion, Mrs. Simo gave the master key to a tenant who was locked out of his apartment. This tenant later misplaced the key and Mrs. Simo got the original copied. To her knowledge, Mr. Bolder is not aware of this incident.

Mrs. Simo thinks she was passed over for the promotion because she is a woman and the mother of two children. She noted that the super at the Bushwick property is a man who also has children and limited childcare responsibilities like Mr. Moreland. She does not want Mr. Moreland to lose his job at Pine Street, but she fears that his proficiency will render her assistant super position unnecessary. Ultimately, Mrs. Simo would like assurance that she can keep her job. In the alternative, she would like a super position at another Est1883 property. Out of concern for her work reputation, she does not want Mr. Bolder notified about her legal inquiry.

Cravens, Dunlop, & Vakili PLLC
Attorney Work Product
Privileged & Confidential
Though her employer is prohibited from punishing her for filing a job discrimination complaint, her concern is warranted. *See Filing A Charge of Discrimination*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/filing-charge-discrimination (last visited Nov. 3, 2021).

II. Legal Analysis of Title VII in the Second Circuit

a. Applicability of Title VII

For Title VII to apply to Mrs. Simo's workplace, her employer must have at least 15 employees. 42 U.S.C. § 2000e-2(a). Est1883 has 15–20 employees between their New York properties and the Connecticut headquarters. Therefore, Title VII covers Mrs. Simo's claim.

b. Establishing A Prima Facie Case

The Second Circuit applies a modified version of the *McDonnell Douglas* framework where the plaintiff can opt to prove that the defendant's nondiscriminatory reason for the adverse employment action was pretext or prove that discrimination played a motivating factor in the adverse action. *See Holcomb v. Iona Coll.*, 521 F.3d 130, 138–42 (2d Cir. 2008) (describing the *McDonnell Douglas* framework). This framework uses a burden shifting approach where plaintiffs bear the initial burden of establishing a prima facie case. *See Shumway v. UPS*, 118 F.3d 60, 63 (2d Cir. 1997) ("In a Title VII case the burden is on the plaintiff to establish a prima facie case of discrimination."). At this first stage, the plaintiff only needs minimal proof of discrimination. They can rely on circumstantial evidence to satisfy this burden. *See Holcomb*, 521 F.3d at 141 ("[I]t is well settled…that employment discrimination plaintiffs are entitled to rely on circumstantial evidence.").

To establish a prima facie case, the plaintiff must satisfy four prongs. The first of which is showing that they belong to a protected class. *Shumway*, 118 F.3d at 63–4. Title VII protects

employees from sex discrimination but does not make explicit reference to parental status in the text. *See* 42 U.S.C. § 2000e-2. Case law demonstrates that "sex-plus discrimination" can be used to show membership to a protected class. *Trezza v. Hartford, Inc.,* 98 Civ. 2205 (MBM), 1998 U.S. Dist. LEXIS 20206, at *15–16 (S.D.N.Y. Dec. 28, 1998). This form of employment discrimination "occurs when a person is subjected to disparate treatment based, not solely on her sex, but on her sex considered in conjunction with a second characteristic." *Id.* In this case, Mrs. Simo is the mother of two children. As noted *supra*, the current two supers at Est1883 properties are men who have children but have limited childcare responsibilities. This suggests that Mrs. Simo's gender and motherhood in conjunction may have been a consideration in Mr. Bolder's failure to promote her. This fact alone satisfies the first prong, as there only needs to be minimal evidence of discrimination.

The second prong requires the plaintiff to demonstrate that they were qualified for the job. *Shumway*, 118 F.3d at 63–4. Evidence that the plaintiff possessed the "basic skills necessary" for the job is sufficient to satisfy this prong. *See Powell v. Syracuse Univ.*, 580 F.2d 1150, 1155 (2d Cir. 1978). For Mrs. Simo, qualification can be demonstrated by her good reputation with the tenants, her ties with local vendors, and years of assistant super experience.

The third prong requires the plaintiff to show an adverse employment action. *Shumway*, 118 F.3d at 63–4. It is "well established that a failure to promote constitutes as adverse employment action." *See Collins v. Cohen Pontani Lieberman & Pavane*, No. 04 CV 8983(KMW)(MHD), 2008 U.S. Dist. LEXIS 58047, at *47–48 (S.D.N.Y. July 30, 2008) (citing *Demoret v. Zegarelli*, 451 F.3d 140, 151 (2d. Cir. 2006); *Mauro v. S. New England Telecomms.*, Inc., 208 F.3d 384, 386 (2d Cir. 2000)). Therefore, we only need to show that Mrs. Simo was not promoted and someone else was hired for the position. The fact that Mr. Bolder did not give her

the opportunity to apply for the lead super position despite her years of experience and that he hired Mr. Moreland, who was outside of the organization and did not have previous super experience, sufficiently demonstrates this.

The final prong requires a showing of circumstances giving rise to an inference of discrimination. *Shumway*, 118 F.3d at 63–64. According to *Back v. Hastings on Hudson Union Free School District*, a plaintiff can rely on the *Price Waterhouse* "stereotyping theory" and "argue that comments made about a woman's inability to combine work and motherhood are direct evidence of such discrimination." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 (2d Cir. 2004). In *Back*, the Second Circuit held that stereotyped remarks can be evidence itself that gender played a substantial role in an adverse employment decision. *Id.* An inference of discrimination can also be "established if the plaintiff shows that the position sought went to a person outside her protected class." *Collins*, 2008 U.S. Dist. LEXIS 58047, at *48–49. Mr. Bolder's statements about Mrs. Simo's "work-life" balance and being a "super-mom" can be used as evidence of sex discrimination. The parental status of the new lead super, Mr. Moreland, and the super at the Bushwick property could also be used as comparator evidence for the discrimination that Mrs. Simo was enduring.

c. Defendant's Burden of Production

After the plaintiff has established a prima facie case, the burden shifts to the defendant employer to articulate a nondiscriminatory or legitimate reason for the adverse employment action. *See Shumway*, 118 F.3d at 63–64. This is only a burden of production. The defendant employer only needs to "*articulate* (not prove)" a nondiscriminatory reason through admissible evidence. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180 (2d Cir. 1992) (emphasis in original). Mr. Bolder will likely argue that Mrs. Simo's tardiness and the ECB violations were

legitimate reasons for his decision to not promote her. He may also argue that Mr. Moreland is more qualified based on his construction experience and the maintenance duties of the super position.

d. Plaintiff's Burden of Proof

After the defendant employer articulates the nondiscriminatory reason, the burden of proof shifts back to the plaintiff where they ultimately have to prove discrimination. *Shumway*, 118 F.3d at 63–4. The plaintiff has two options to prove discrimination and prevail. A plaintiff can choose to rely on the pretext theory. *See Holcomb*, 521 F.3d at 141–42 (noting that "in many cases, a showing of pretext, when combined with a prima facie case of discrimination, will be enough to permit a rational finder of fact to decide that the decision was motivated by an improper motive"). Under the pretext theory, the plaintiff must show that the articulated reason was false, and that discrimination was the real reason. *Id.* This can be accomplished by "persuading the trier of fact that the employer's proffered explanation is unworthy of belief." *Tyler*, 958 F.2d at 1181. In the alternative, the plaintiff can rely on the mixed-motive theory, arguing that an "impermissible factor was a motivating factor, without proving that the employer's proffered explanation was not some part of the employer's motivation." *Holcomb*, 521 F.3d at 141–42; *see also Back*, 365 F.3d at 123–4 (noting that the plaintiff can argue that the defendant's articulated reasons were "not the only reasons and that the prohibited factor was at least one of the motivating factors"). The Second Circuit in *Back* held that the plaintiff can "rely on the same evidence that comprised her prima facie case, without more." *Id.*

The calculus of deciding between the pretext theory or the mixed-motive theory will be primarily based on the evidence available to the plaintiff. But at this final stage, the plaintiff no longer benefits from the "presumption of discrimination" that is intended to help plaintiffs

survive a 12(b)(6) motion to dismiss when establishing their prima facie case. *Holcomb*, 521 F.3d at 141 (turning to the question of whether the plaintiff raised "sufficient evidence upon which a reasonable jury could conclude by a preponderance of the evidence that the decision to fire him" was based on discrimination "without the aid of the presumption").

If Mrs. Simo wants to move forward with litigation, it will be the most strategic to utilize the mixed-motive theory. We do not have enough evidence to show that Mr. Bolder's articulated reasons were pretext as Mrs. Simo frankly admitted that she has shown up late to work and failed to address the ECB violations. Rather than trying to disprove these reasons all together, we can argue that discrimination based on her sex and parental status played a motivating factor in the failure to promote her to super along with Mr. Bolder's articulated reasons. Once again, we can rely on the comments Mr. Bolder made about Mrs. Simo's work life balance and the comments he made to Mr. Muller about Mrs. Simo being a "super mom."

III. Possible Remedies Available to Mrs. Simo

As discussed *supra*, Mrs. Simo has a claim under Title VII and can establish a prima facie case. If she were to win at trial under a pretext theory, she could possibly recover back pay, be granted injunctive relief, be awarded damages, or be granted a court ordered reinstatement. We should anticipate that a judge will likely grant summary judgment to the defendant due to weak evidence of pretext. If we decide to rely on the mixed-motive theory in Mrs. Simo's case, the defendant can take advantage of a limited affirmative defense. *Holcomb*, 521 F.3d at 142 n.4 (citing *Desert Palace Inc. v. Costa*, 538 U.S. 90, 94–95 (2003); 42 U.S.C. § 2000e-5(g)). The defendant employer has "the opportunity to demonstrate, by a preponderance of the evidence, that it would have taken the same action in the absence of the impermissible motivating factor."

Id. If Mr. Bolder meets this burden, "the court may not award damages or order reinstatement but may still order declaratory relief and some forms of injunctive relief." *Id.*

Mrs. Simo expressed that she would like to either keep her current position as an assistant super at the Pine Street location or receive a new super position at another Est1883 location. Since Mrs. Simo will likely not have enough evidence to counter this affirmative defense, mediation will be an avenue worth exploring. Negotiating a contract for Mrs. Simo's employment or guaranteeing her a super position at a different Est1883 property will best fit her situation and better serve her goals.

IV. Conclusion

According to employment discrimination case law in the Second Circuit, Mrs. Simo qualifies for a protected class status under the sex-plus discrimination theory and could bring a prima facie case. While Mr. Bolder's statements about her ability to do the super job because of her motherhood duties could be used as evidence of a discriminatory motive, Mrs. Simo does not have enough evidence to prevail at trial. Mr. Bolder has credible evidence of nondiscriminatory reasons for not promoting Mrs. Simo to super which we would be unable to strongly rebut. Even if Mrs. Simo was able to prevail under the mixed-motive theory, Mr. Bolder would likely be able to take advantage of the affirmative defense, limiting Mrs. Simo's relief to declaratory or injunctive relief, neither of which would result in job assurance for Mrs. Simo. In this case, mediation is a better route than litigation and caters to Mrs. Simo's goals.

Applicant Details

First Name	**Greta**
Last Name	**Chen**
Citizenship Status	**U. S. Citizen**
Email Address	**greta.chen@nyu.edu**
Address	**Address** Street **801 15th St S** City **Arlington** State/Territory **Virginia** Zip **22202** Country **United States**
Contact Phone Number	**2052389352**

Applicant Education

BA/BS From	**Duke University**
Date of BA/BS	**May 2021**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hershkoff, Helen
helen.hershkoff@nyu.edu
212-998-6715
Johnson, Gail
gail.k.johnson@usdoj.gov
Yoshino, Kenji
kenji.yoshino@nyu.edu
212-998-6421

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Greta Chen
801 15th Street S, Apt 617
Arlington, VA 22202
(205) 238-9352
greta.chen@nyu.edu

June 12, 2023

The Honorable Leslie Abrams Gardner
United States District Court for the Middle District of Georgia
201 West Broad Avenue
Albany, GA 31701

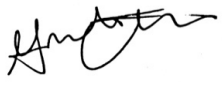
Dear Judge Gardner:

I am a rising third-year student at New York University School of Law seeking a clerkship in your chambers for the 2024-26 term or any term thereafter. I grew up in Birmingham, Alabama and anticipate returning to practice in the South after graduation. Additionally, I plan to pursue a career in civil rights litigation, and I am particularly interested in clerking for you because of your dedication to ensuring equality under the law. Last spring, I interned at the NAACP Legal Defense Fund, and this fall, I will be a part of NYU's Critical Race Lawyering in Civil Rights Clinic. During the school year, I also represent public school students at their suspension hearings through the Suspension Representation Project.

Attached please find my resume, transcript, and writing sample. The writing sample is a paper I wrote for my Racial Justice course last spring. My letters of recommendation are from Helen Hershkoff, Kenji Yoshino, and Gail Johnson. Professor Hershkoff taught my Civil Procedure class, and I worked with her to update the Federal Practice and Procedure supplementation last year. She can be reached at helen.hershkoff@nyu.edu or (212) 998-6285. Professor Yoshino was my Constitutional Law instructor. I helped draft and revise portions of his article about transgender rights, and he has provided invaluable feedback on my own writing. He can be reached at kenji.yoshino@nyu.edu or (212) 998-6421. Supervisory Trial Counsel Gail Johnson oversaw my work last summer at the Department of Justice, and I consider her a close mentor. She can be reached at gail.k.johnson@usdoj.gov or (202) 616-4280.

If you need any additional information, please do not hesitate to contact me at the above email address or telephone number. Thank you for your consideration, and I look forward to hearing from you.

Respectfully,



Greta Chen

GRETA CHEN

801 15th Street S, Apt 617, Arlington, VA 22202 • (205) 238-9352 • greta.chen@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, J.D. Candidate, May 2024
GPA: 3.73
Honors: *New York University Law Review*, Executive Editor
Robert McKay Scholar—*top 25% of class after four semesters*
Robert A. Katzmann Fellow—*stipend to conduct research for Katzmann Symposium*
Chesler Scholarship in Litigation—*for demonstrated talent in civil trial litigation*
Activities: Suspension Representation Project, Case Manager and Student Advocate
Asian-Pacific American Law Students Association, Co-Chair

DUKE UNIVERSITY, B.S. in Economics, May 2021
GPA: 3.86
Honors: University Scholars Finalist—*partial tuition scholarship based in part upon academic merit*
Activities: Debating Society, Secretary
Sanford School of Public Policy, Social Media Intern

EXPERIENCE

WILMER CUTLER PICKERING HALE AND DORR LLP, Washington, DC
Summer Associate, May 2023–July 2023

RACIAL EQUITY STRATEGIES CLINIC, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, New York, NY
Legal Intern, January 2023–May 2023
Analyzed legal issues related to redistricting litigation, such as the scope of legislative privilege in voting rights contexts. Reviewed and summarized deposition transcripts to identify favorable and unfavorable testimony in voter suppression case. Prepared comprehensive report on history of discriminatory voting practices in the South.

PROFESSOR KENJI YOSHINO, NYU SCHOOL OF LAW, New York, NY
Research Assistant, October 2022–May 2023
Reviewed and revised forthcoming article about litigation strategies for transgender rights. Researched LGBTQ+ laws across different jurisdictions, comparing the United States to countries like Iran and Japan.

PROFESSOR HELEN HERSHKOFF, NYU SCHOOL OF LAW, New York, NY
Research Assistant, May 2022–October 2022
Researched litigation advantages of the United States as a plaintiff in federal court, focusing on False Claims Act litigation. Edited and cite-checked the most recent edition of the Federal Practice and Procedure supplementation.

U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, FEDERAL TORT CLAIMS ACT SECTION, Washington, DC
Law Clerk, May 2022–July 2022
Drafted legal memoranda on topics including the applicability of absolute immunity in a malicious prosecution claim. Wrote motion to exclude expert witness testimony of pharmaceutical expert in multimillion-dollar healthcare fraud case. Analyzed admissibility of Office of Professional Responsibility Report findings.

BURR & FORMAN LLP, Birmingham, AL
Pre-Law Intern, June–July 2019, 2020, and 2021
Composed memoranda for corporate and litigation matters. Recommended diversity, equity, and inclusion initiatives to Executive Committee. Awarded 2nd Place in mock trial competition on search and seizure case.

LANGUAGES AND INTERESTS

Conversational in Mandarin; basic Spanish. Enjoy art and photography, playing tennis, and watching horror films.

Name: Greta Y Chen
Print Date: 06/07/2023
Student ID: N19144876
Institution ID: 002785
Page: 1 of 1

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: David Simson			
Torts	LAW-LW 11275	4.0	A-
Instructor: Mark A Geistfeld			
Procedure	LAW-LW 11650	5.0	A
Instructor: Helen Hershkoff			
Contracts	LAW-LW 11672	4.0	A
Instructor: Richard Rexford Wayne Brooks			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Randy Hertz, Vincent Southerland			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Property	LAW-LW 10427	4.0	B+
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: David Simson			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A-
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Ekow Nyansa Yankah			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Randy Hertz, Vincent Southerland			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Resisting Injustice Seminar	LAW-LW 10310	2.0	A
Instructor: Carol Gilligan, David A J Richards			
Resisting Injustice Seminar-Wc	LAW-LW 10469	1.0	A
Instructor: Carol Gilligan, David A J Richards			
Antitrust Law	LAW-LW 11164	4.0	B+
Instructor: Daniel S Francis			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A-
Instructor: Barbara Gillers			
Constitutional Law	LAW-LW 11702	4.0	B+
Instructor: Kenji Yoshino			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Kenji Yoshino			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Racial Justice Colloquium	LAW-LW 10540	2.0	A-
Instructor: Deborah Archer, Vincent Southerland			
Advanced Trial Simulation	LAW-LW 11138	2.0	A-
Instructor: David R Marriott, Evan R Chesler			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			
Racial Equity Strategies Clinic	LAW-LW 12455	3.0	A
Instructor: Raymond Audain			
Racial Equity Strategies Clinic Seminar	LAW-LW 12456	2.0	A
Instructor: Raymond Audain			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Kenji Yoshino			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	58.0	58.0

McKay Scholar-top 25% of students in the class after four semesters
Staff Editor - Law Review 2022-2023

End of School of Law Record

Unofficial

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

New York University
A private university in the public service

School of Law
40 Washington Square South, Room 308C
New York, NY 10012-1099

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
Co-Director, The Arthur Garfield Hays Civil Liberties Program

Telephone: (212) 998-6285
Fax: (212) 995-4760
Email: helen.hershkoff@nyu.edu

June 5, 2023

Dear Judge:

It is a pleasure to recommend Greta Chen for a judicial clerkship with you following her graduation from New York University School of Law in May 2024. Greta was my student and also worked as my Research Assistant, and I have a strong sense of her aptitude, character, and skills. I believe she would be an excellent judicial clerk.

I met Greta her first year at NYU when she was a student in my required course in Civil Procedure. I taught the course via Zoom and by hosting additional office hours and other informal sessions, was able to get to know those students who made use of these opportunities. Greta was among them. She is engaged, curious, and public spirited, and her answers to the questions on the final examination showed strong powers of analysis and an excellent mastery of procedural doctrine.

Based on her academic performance, I invited Greta to work as a part-time summer Research Assistant (I would have been happy to hire her as a Teaching Assistant, as well, but she was already committed to other activities). As an RA, Greta helped to update portions of volume 14 of Wright & Miller's Federal Practice and Procedure, focusing on recent developments involving the United States as a plaintiff. Some of the material was familiar (for example, pleading requirements under statutes such as the False Claims Act), but much of it was not (for example, relator standing and when the United States can litigate on behalf of individuals). Greta undertook this research while working full-time at the Department of Justice in Washington, DC, in the Federal Tort Claims Act division, and she was able to manage her time well and meet all of my deadlines. She showed herself to be precise, comprehensive, and reliable in her research, and I have no doubt that these skills would serve her well as a judicial clerk.

Greta has contributed to the Law School and broader community in many important ways. In particular, she volunteers with the Suspension Representation Project, representing NYC public school students at their suspension hearings. Indeed, she was selected to serve as a case manager, and in that role she evaluates each intake and determines whether to assign the case internally to an NYU student or to refer the client to another organization. The work is demanding; during the 2022–2023 academic year, the Project placed more than 80 cases with consulting attorneys from The Legal Aid Society and other groups as needed. She also serves as Co-Chair of the Asian-Pacific American Law Students Association, and in that position

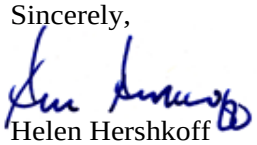
spearheaded fundraising, created the annual budget, and represented APALSA at meetings with the Law School administration and other student groups. Greta also is a member of the Law Review. These positions require maturity, commitment, and common sense—qualities that Greta has in abundance and would serve her well as a judicial clerk. I add that she is analytically sharp, detail-oriented, openminded, and energetic.

Greta grew up in Alabama, the child of Asian American immigrants. She has told me that her family experiences profoundly shaped her views of the law and of the importance of courts. She also gained important professional experience while in Alabama, interning at various law firms in Birmingham over the three summers before entering NYU. She is skilled at navigating diverse groups and enjoys working as part of a team (but also is independent and self-motivated). In particular, she is an active listener, seeks to find common ground, and attempts to reconcile opposing perspectives while remaining authentic.

In short, I recommend Greta with enthusiasm—her intelligence, collegiality, writing ability, and commitment would, in my view, make her an excellent judicial clerk. I would be happy to answer any questions that you might have.

Thank you for your consideration.

Sincerely,



Helen Hershkoff